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In the

Supreme Court of the United States.

OCTOBER TERM, 1929.

No. 12, ORIGINAL.

THE STATE OF CONNECTICUT,
COMPLAINANT,

v.

THE COMMONWEALTH OF MASSACHUSETTS,
DEFENDANT.

SUBSTITUTE BRIEF OF MASSACHUSETTS, IN OPPOSITION TO

1. Motion to Dismiss the Defendant's Answer;
2. Motion to Strike Out Portions of the Defendant's Answer.

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In the

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OCTOBER TERM, 1929.

No. 13, ORIGINAL.

THE STATE OF CONNECTICUT,

COMPLAINANT,

v.

THE COMMONWEALTH OF MASSACHUSETTS,

DEFENDANT.

SUBSTITUTE BRIEF OF THE DEFENDANT, THE COMMONWEALTH OF MASSACHUSETTS, IN OPPOSITION TO

1. Motion to Dismiss the Defendant's Answer;
2. Motion to Strike Out Portions of the Defendant's Answer.

STATEMENT OF THE CASE.

This is an original bill in equity filed by leave of court by the complainant, the State of Connecticut, seeking to prevent and enjoin the defendant, the Commonwealth of Massachusetts, from diverting—

(*a*) the flood waters of the Ware river,

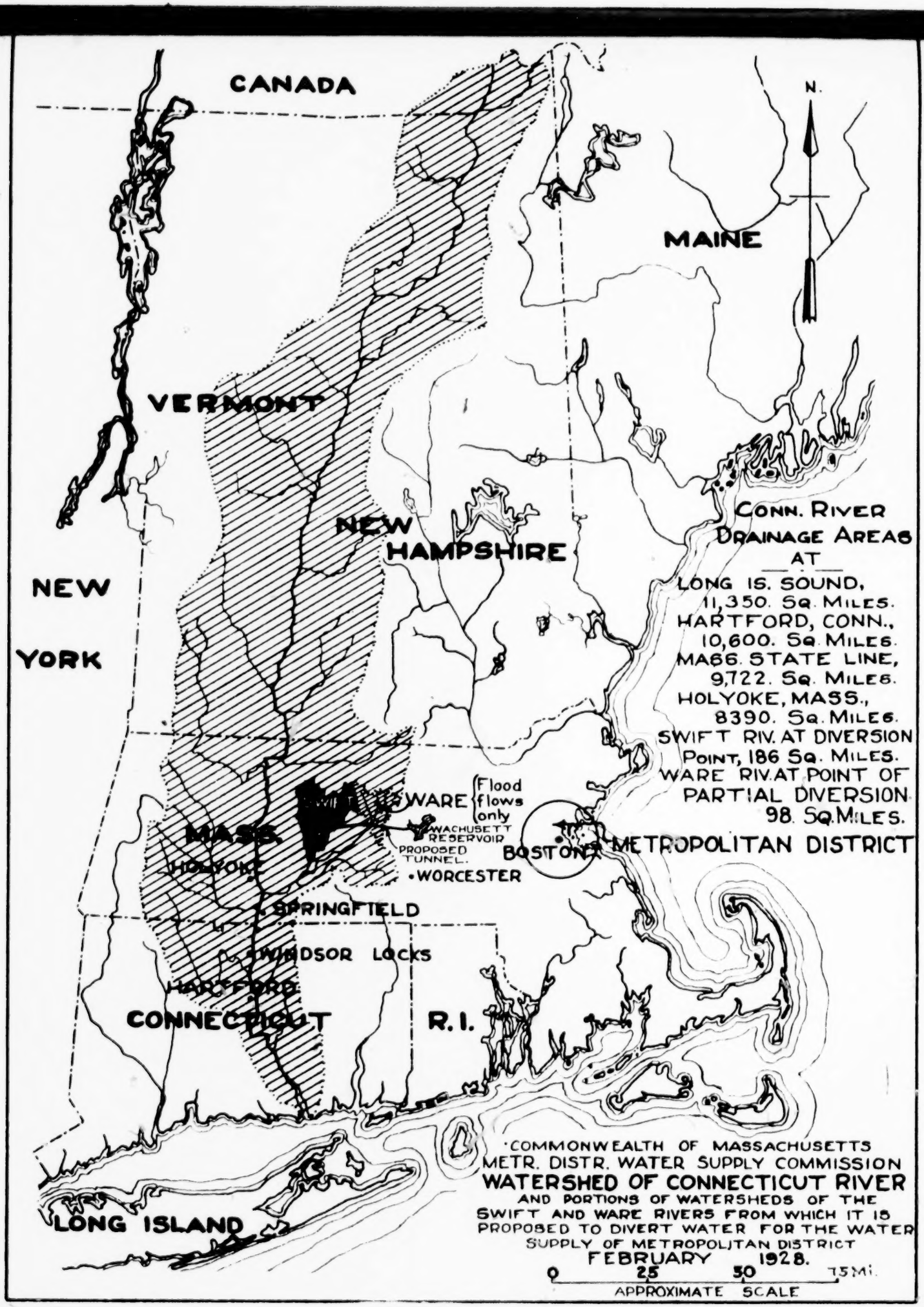
(*b*) certain waters of the Swift river,

both of which streams are non-navigable tributaries of the Chicopee river, itself a non-navigable tributary of the Connecticut river, and are situated wholly within the geographical limits of Massachusetts. (See map, Original Answer, opposite p. 32; Reprint of Answer, opposite p. 36; see this brief, opposite this page.) The purpose of the proposed diversion, authorized by two acts of the General Court of Massachusetts, is to provide a suitable supply of water for drinking and domestic use for the Metropolitan Area surrounding the City of Boston, which is now threatened with a serious water shortage (Answer, pp. 23-24; Reprint of Answer, pp. 26-27). The Massachusetts legislation authorizing the project is found in Acts of 1926, c. 375, and Acts of 1927, c. 321 (Answer, pp. 38-77; Reprint of Answer, pp. 36-80).

Connecticut, appearing not only as a proprietor of riparian lands (Bill, p. 6), but also as *parens patriae* (Bill, pp. 2, 6, 10, 13), alleges that the diversion will seriously impair navigation upon the Connecticut river (Bill, p. 10), that it will diminish the flow of water in the river sufficiently to cause damage to the health (Bill, pp. 8, 9, 11, 12), welfare, and property interests of Connecticut and her citizens, and that it will be a violation of the riparian rights (Bill, p. 7) of the State of Connecticut and of the citizens of that State, who, it is alleged, can be represented as against another sovereign State of the Union only by the State as *parens patriae*.

Analysis of Massachusetts Answer.

Massachusetts in an answer to the bill, filed by leave of court, denies that any injury to navigation, to the State of Connecticut, or to the citizens of that State will result from the proposed diversion, and affirmatively alleges that compared to the total flow in the Connecticut river at the Connecticut-Massachusetts boundary the flow to be diverted is



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negligible and insignificant (Answer, pp. 1-27; Reprint of Answer, pp. 1-30—This answer was originally filed in March, 1928. It was amended by leave of court on December 2, 1929. The answer with amendments included has been reprinted and the reprint is herein referred to as "Reprint of Answer." All references to the Answer or to the Amended Answer may be found in the Reprint of the Answer at the point indicated in the particular reference). [It appears from the bill (p. 4) that the total watershed of the Connecticut river is 11,300 square miles. The total watershed of the Ware river is alleged to be 221 square miles and that of the Swift river is set forth as 213 square miles (Bill, p. 5). It appears from the answer of Massachusetts, however, that the drainage area of the Ware river above the point of partial diversion is only 98 square miles (Answer, par. 7, p. 9; Reprint of Answer, p. 11) and that the drainage area of the Swift river above the point of diversion is only 186 square miles (see Answer, par. 17, p. 18; Reprint of Answer, p. 21, and plan opposite Answer p. 32; Reprint of Answer, p. 36; Amended Answer, Appendix "C," p. 27; Reprint of Answer, p. 93—The statistics of the Massachusetts project are collected and summarized in Appendix "B" of this brief, *infra*, pp. 100-102).] Massachusetts also sets up certain affirmative legal and equitable defenses (Answer, pp. 27-32; Reprint of Answer, pp. 30-35), including—

(*a*) The existence of an emergency within Massachusetts constituting a justification for a reasonable use of the waters to be taken by the proposed diversion (Answer, pp. 27-28; Reprint of Answer, pp. 30-31).

(*b*) The existence of an adequate remedy at law in the State of Connecticut and its citizens in the form of compensation for any injury caused to the State or its citizens (Answer, pp. 24-25, 28-29; Reprint of Answer, pp. 31-32, 34).

(*c*) The serious injury to the welfare of the citizens of Massachusetts, if the diversion is prohibited, compared to the negligible and trivial damage to Connecticut and its citizens possibly caused if the diversion is permitted, which should lead a court of equity to give substitutional relief rather than specific relief (Answer, pp. 29, 30; Reprint of Answer, pp. 32, 34).

(*d*) The contention that the claim of Connecticut goes beyond a claim in behalf of the State in its true capacity as *parens patriae* (Answer, pp. 29-30; Reprint of Answer, p. 34).

(*e*) The contention that, so far as relief is sought for interference with navigation, the matter is one delegated under due constitutional authority by the Congress of the United States to the Secretary of War and his subordinates (Answer, pp. 6, 10, 30; Amended Answer, pp. 6-32; Reprint of Answer, pp. 33-34, 81-102).

(*f*) The contention that the diversion is one which is *de minimis* and in all respects a reasonable use of the waters of the Swift and Ware rivers by Massachusetts (Answer, pp. 11, 15, 18, 20, 22, 24, 28, 29, 31; Reprint of Answer, pp. 13, 14, 15, 17, 18, 21, 22, 23, 25, 26-27, 30, 33, 35).

(*g*) Laches (Answer, pp. 28, 31; Reprint of Answer, pp. 31, 34).

(*h*) The benefit to Connecticut and lower riparian owners from the stabilization of stream flow through the storage of water in wet seasons and the release of some of such stored water in dry seasons (Answer, pp. 11-12, 15, 19; Reprint of Answer, pp. 14-15, 22).

Connecticut's Unsuccessful Attempt to Join War Department Officials as Parties Respondent.

At the last term of court (October term, 1928) the State of Connecticut requested leave of this Honorable Court to file a motion which—

1. Sought to join the Chief of Engineers, United States Army, and the Secretary of War as parties respondent in this equity case.

2. Sought to obtain an injunction against these officials of the War Department—

(*a*) prohibiting them from acting upon the then pending application for a determination of the effect of the proposed diversion from the Swift river upon the navigable capacity of the navigable portion of the Connecticut river.

(*b*) ordering them to revoke their previously announced determination that (with certain insubstantial and immaterial limitations) the proposed diversion from the Ware river would have no adverse effect upon the navigable capacity of the Connecticut river.

The motion was based on allegations—

1. That the Secretary of War and the Chief of Engineers had no jurisdiction to determine that the proposed diversions would have no adverse effect on the navigation of the Connecticut river.

2. That the determination in fact made by the War Department officials was erroneous.

On April 22, 1929, this Honorable Court refused leave to Connecticut to file this motion, 279 U.S. 821.

Applications by Massachusetts to the War Department for Permission to Make the Proposed Diversions—Action thereon by the War Department.

On November 30, 1927 (Amended Answer, par. 1, p. 6; Answer, p. 6; Appendices to Amended Answer, "B" and "C," pp. 12-32; Reprint of Answer, pp. 81-102), the Metropolitan District Water Supply Commission (acting at the suggestion of the Providence District Engineer of the War Department) filed formal application for permits to make the diversions contemplated under the Massachusetts legislation (Answer, Appendix "A," pp. 33-77;

Reprint of Answer, pp. 36-80). After public hearings and extended investigation, during which counsel and engineers for the State of Connecticut were heard at length, the War Department, upon recommendation of the Chief of Engineers and with the approval of the Secretary of War, determined—

(*a*) on March 14, 1928, that the proposed diversion from the Ware river "will have no adverse effect on the navigable capacity of the Connecticut River" (Amended Answer, p. 7; Appendix "B" thereto, p. 16; Reprint of Answer, pp. 8, 85-87), and announced that the War Department would interpose no objection to such proposed diversion, provided that it remained within stipulated limits substantially those of the Massachusetts Acts of 1926, chapter 375, section 4 (Answer, pp. 37-38; Reprint of Answer, pp. 40-41);

(*b*) on May 11, 1929, that the proposed diversion from the Swift river [if kept within certain limits, set forth in the order of the Department; which limits will result in a modification of the diversion authorized by the Massachusetts Acts of 1927, chapter 321, section 1 (see Answer, pp. 48-50; Reprint of Answer, pp. 51-53)] would not substantially alter or modify the condition or navigable capacity of the channel of the navigable portion of the Connecticut river (Amended Answer, p. 7; Appendix "C," p. 29; Reprint of Answer, pp. 8, 99-100), and announced that subject to the limitations stipulated the Department would interpose no objection to the proposed diversion.

War Department approval has thus been obtained for the whole Ware river diversion contemplated by the Massachusetts legislation, with trivial and immaterial modifications; and for very much the greater part of the Swift river diversion authorized by the Massachusetts legislation. Of course, while the War Department limitations remain in effect, they will, as a practical matter, control the terms of the diversion in so far as they are inconsistent with the Massachusetts legislation.

The Amendments of the Answer.

The action of the War Department did not take place until after the filing in March, 1928, of the original answer in these equity proceedings. Certain provisions of the answer required amendment in view of these recent events. The answer as amended contains the pertinent portions of the applications to the War Department and of the decisions of that Department (Appendices "B" and "C"; Amended Answer, pp. 12-32; Reprint of Answer, pp. 81-102). The amendments were allowed December 2, 1929.

SUMMARY AND ANALYSIS OF THE PRESENT MOTIONS AND OF THE ARGUMENTS OF THE PARTIES.

The Present Motions of the Complainant.

The State of Connecticut now seeks leave to file—

(*a*) a motion to dismiss the defendant's answer.

(*b*) a motion to strike out certain portions of the defendant's answer.

These motions in the nature of demurrers to the whole answer or to specific portions of the answer raise generally the following contentions:

1. Connecticut contentions relating to navigation.

Connecticut contends (Mot. to Dismiss, pars. 2-9, pp. 5-8; Mot. to Strike Out, par. 8, pp. 20-24; see Argument, *infra*, pp. 14-35) that the answer and (in the motion to strike out) that certain passages thereof reveal that Massachusetts has not obtained the necessary authorization of its project from Congress or from the Secretary of War; particularly under the provisions of the Act of March 3, 1899, §§ 9 and 10 (30 STAT. AT L. 1151, U.S. Code, Tit. 33, §§ 401, 403, quoted, *infra*, pp. 14-15).

The Massachusetts answer reveals that the Secretary of War has found that the project (with certain modifications) will not impair navigation upon any navigable water (Amended Answer, Appendices "B" and "C," pp. 12-32; Reprint of Answer, pp. 81-102). It is the contention of Massachusetts that this action of the Secretary of War is the only Federal action, if any, possibly required by the Act of March 3, 1899, inasmuch as Massachusetts is not erecting any structures in a navigable stream or (according to the War Department findings) altering the navigable capacity of any navigable stream.

2. Connecticut contentions relating to the alleged riparian rights of Connecticut and her citizens and to the alleged taking of those rights.

Connecticut alleges that the answer shows that the Massachusetts project reveals a diversion which is an invasion of the riparian rights of Connecticut and of her individual citizens regardless of the effect of the diversion or of its size with relation to the whole stream flow of the Connecticut river at the Massachusetts-Connecticut boundary (Motion to Dismiss, pars. 14-16, pp. 8-11; see also Mot. to Strike Out, pars. 9, 10, 11, 12, pp. 24-30). The further contention is made (Motion to Dismiss, pars. 10-13, pp. 8-9; see also Motion to Strike Out, pars. 9, 10, 11, and 12, pp. 24-30) that the proposed diversion by authorization of the Massachusetts Legislature is in effect an attempt by Massachusetts to take by eminent domain property rights in Connecticut. It is contended that this is beyond the power of Massachusetts.

The Massachusetts answer, either by the denial of allegations contained in the Connecticut bill or by affirmative allegation, sets up facts showing that the Massachusetts project will in fact result in the diversion of only a small portion of the waters which flow in the Connecticut river

across the Connecticut–Massachusetts boundary, and that this diversion,—

(*a*) will have no adverse effect upon the navigable capacity of the Connecticut river.

(*b*) will constitute only a reasonable use of the interstate stream.

(*c*) will in fact have no tendency to injure health, welfare, safety, or property of the State of Connecticut or its citizens.

(*d*) will benefit Connecticut by stabilizing stream flow, through the storage of flood waters, some of which will be released as a compensatory flow in dry summer months.

These facts, Massachusetts contends (see summary of argument, *infra*, pp. 12-13), reveal that the project is within her sovereign power because the proposed diversion constitutes a reasonable use of the waters of the Connecticut river watershed, not only under the principle of equitable division between States of the benefit to be derived from an interstate stream but also under the principles of riparian law in force in the two States.

3. Connecticut contentions that facts alleged in answer are immaterial so far as they form basis for equitable defenses, or for the application of equitable principles of denial of specific relief.

Connecticut contends that the following allegations of the answer are immaterial, viz.: those setting up the existing emergency in Boston (Mot. to Dismiss, pars. 15 and 16, pp. 10-11; Mot. to Strike Out, pars. 3, 5, pp. 8-12, 14); the benefit to Connecticut of a compensatory flow in summer months (Mot. to Strike Out, pars. 1, 2, 7, 10, pp. 5-8, 17-20); the existence of an adequate remedy at law (Mot. to Strike Out, par. 6, pp. 14-17); and laches (Mot. to Strike Out, par. 4, pp. 12-14). Massachusetts contends that these allegations not only show the reasonable nature of the diversion but also furnish a basis for the application

of equitable defenses and for the denial of specific relief upon the equitable principle of comparative damage and necessity.

With respect to all Connecticut's contentions, Massachusetts submits that the issues are of such wide scope and so important as to necessitate a finding of all the facts by the Special Master appointed in this cause before any determination by this Honorable Court of the materiality of the facts stated in the answer.

POINTS AND AUTHORITIES.

Summary of Argument.

There are two main groups of issues involved in these motions:

(1) Those issues relating to the Federal interest in the protection of navigation upon the Connecticut river; an interest based upon the power given to Congress to regulate interstate and foreign commerce under article I, section 8, of the Constitution of the United States.

(2) Those issues relating to the sovereign and riparian rights of Connecticut and Massachusetts *inter se* as *quasi*-sovereign States—apart from any superior Federal interest in navigation.

We contend that the first group of issues is to all intents determined by the action of the War Department set forth in the Amended Answer, Appendices "B" and "C," pp. 12-32; Reprint of Answer, pp. 81-102. The second group of issues deals with the problem of what principles of law are applicable to this case—and with the application of those principles to the facts as pleaded.

We shall make the following contentions:

I. The action of the Secretary of War and the Chief of Engineers upon the applications for the approval of the contemplated diversions constituted a proper perform-

ance of the duties delegated to them by the Act of Congress of March 3, 1899. That action by finding the proposed diversions unobjectionable (within the limits specified in the War Department findings) so far as navigation is concerned, forecloses any contention of Connecticut that the diversion will injure navigation, in the absence of proof of bad faith (*infra*, pp. 14-35).

A. The duty of determining whether any given diversion of water, which if not diverted will flow into a navigable stream, will constitute or cause an obstruction of the navigable capacity of that stream devolves upon the Secretary of War and the Chief of Engineers under the Act of March 3, 1899. No direct action by Congress is necessary under section 9 or section 10 of that act in view of the action of the Secretary of War in the present case and because of the fact that the Massachusetts project contemplates no structure in any navigable water (*infra*, pp. 14-22).

B. The determinations of the Secretary of War upon the contemplated Swift and Ware diversions constitute a valid authorization of those diversions so far as the question of navigability is concerned (*infra*, pp. 22-31).

1. The correctness of the Secretary's determination cannot be reviewed, in the absence of proof of bad faith or failure to comply with applicable procedural requirements (*infra*, pp. 22-26).

2. Congress having undertaken a comprehensive scheme for the protection of navigation, the whole subject-matter, so far as within the scope of existing Congressional regulation, is the exclusive concern of Congress and of the War Department, by delegation of the power of Congress (*infra*, pp. 26-31).

C. Only the navigability issue is concluded by the War Department findings (*infra*, p. 31).

D. The certain benefit in fact to the navigability of the Connecticut river as the result of the storage of water in the Swift river valley (particularly as modified by the War Department findings) strengthens the necessity of giving to the War Department decisions conclusive effect upon the issue of navigability (*infra*, pp. 32-34).

E. The allegations both of the original and of the amended answer deny that any injury to navigation is caused by the project. Issues of fact are thus raised which are appropriate for consideration by the Special Master appointed by this Court; provided that this Court should deem it proper, notwithstanding the action of the War Department, to consider the issue of the effect of the project upon navigation (*infra*, pp. 34-35).

II. The law applicable to the case at bar is to be determined by this Honorable Court in the light of the whole situation of fact; having due regard to the decisions of this Court in other interstate cases, to the municipal law in force in Massachusetts and Connecticut, to pertinent provisions of international law and practices, and to the customary methods of obtaining and using water in the two States here involved. No one of these factors is all important (*infra*, pp. 35-79).

A. The municipal riparian law of Connecticut and Massachusetts is not all important. It is merely one element of the law of this case (*infra*, pp. 37-43).

B. The decisions of this Court establish the principle of an equitable division of the benefits arising from an interstate river among the States through which the river passes (*infra*, pp. 43-54).

C. International law establishes the principle of equitable division of the benefits of interstate waters as between the sovereigns through whose lands the waters pass. In making an equitable division of beneficial use,

due weight must be given to the comparative benefit to be derived by each sovereign from each particular use. The fundamental and most important use of water is for quenching thirst and for other domestic purposes (*infra*, pp. 54-61).

D. The riparian law in force in Connecticut and in Massachusetts and the practice of the two States in permitting diversions of water for domestic water supply purposes is an element of the law applicable to this case (*infra*, pp. 61-79). Inasmuch as the riparian law permits reasonable diversions of water and inasmuch as Connecticut habitually permits diversions of streams for the purpose of supplying municipalities with water for domestic use, Connecticut in equity cannot complain if Massachusetts makes reasonable use of interstate waters arising within her borders for similar purposes, even if a diversion be necessary: provided Massachusetts does not permanently abstract more than the share of such interstate waters to which she is entitled under the doctrine of equal division of benefit.

III. Upon the issues raised by the answer, Massachusetts alleges facts which, if proved, constitute a full and adequate defense to the bill of complaint. The motions to dismiss and to strike out the answer should be denied and the case should be committed to the Special Master.

A. As a matter of law the facts alleged in the answer, if taken to be true, constitute a full defense to the bill, and specific equitable relief should be denied (*infra*, pp. 79-87).

B. It is respectfully submitted that, as a matter of discretion, this Honorable Court should deny the motions of Connecticut and should commit this case to the Special Master for findings of fact (*infra*, pp. 88-90).

I.

THE ACTION OF THE SECRETARY OF WAR AND THE CHIEF OF ENGINEERS UPON THE APPLICATIONS FOR THE APPROVAL OF THE CONTEMPLATED DIVERSIONS CONSTITUTED A PROPER PERFORMANCE OF THE DUTIES DELEGATED TO THEM BY THE ACT OF CONGRESS OF MARCH 3, 1899. THAT ACTION BY DECIDING THAT THE DIVERSION IS UNOBJECTIONABLE (WITHIN THE LIMITS SPECIFIED IN THE WAR DEPARTMENT FINDINGS) SO FAR AS NAVIGATION IS CONCERNED, FORECLOSES ANY CONTENTION OF CONNECTICUT THAT THE DIVERSION WILL INJURE NAVIGATION, IN THE ABSENCE OF PROOF OF BAD FAITH.

A. The Duty of Determining whether Any Given Diversion of Water, which if Not Diverted will Flow into a Navigable Stream, will Constitute or Cause an Obstruction of the Navigable Capacity of that Stream Devolves upon the Secretary of War and the Chief of Engineers under the Act of March 3, 1899. No Direct Action by Congress is Necessary.

Sections 9 and 10 of the Act of March 3, 1899, 30 STAT. AT L. 1151 (U.S. Code, Tit. 33, §§ 401, 403), read as follows:

> "SEC. 9. That it shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War; *Provided*, That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within,

the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced: *And provided further*, That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of War, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War.

"SEC. 10. That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner *to alter or modify the* course, location, condition, or *capacity of*, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, *or of the channel of any navigable water of the United States*, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same." (Italics ours.)

The Wisconsin Case.

The precise nature of the authority and duty delegated by Congress in these sections was recently considered by this Honorable Court in—

> *Wisconsin* v. *Illinois and Sanitary District*, 278 U.S. 367, 412-413—

where it was said:

> "The policy carried out in the Act of March 3, 1899, had been begun in the Act of September 19, 1890, c. 907; 26 Stat. 454, 455. Sections 9 and 10 were the rearranged result of the provisions of Sections 7 and 10 of the Act of 1890. A new classification was made in Sections 9 and 10 of the Act of 1899, and substituted for Section 10 of the Act of 1890. The latter provided that the creation of any obstruction to navigable capacity was prohibited, unless 'affirmatively authorized by law' and this was changed so as to read 'affirmatively authorized by Congress.' The change in the words of the first clause of Section 10 was intended to make mere State authorization inadequate. *Sanitary District* v. *United States*, 266 U. S. 405, 429; *United States* v. *Bellingham Bay Boom Co.*, 176 U. S. 211. It was not intended to override the authority of the State to put its veto upon the placing of obstructing structures in navigable waters within a State and both State and Federal approval were made necessary in such case. *Cummings* v. *Chicago*, 188 U. S. 410. The words 'affirmatively authorized by Congress' should be construed in the light of the administrative exigencies which prompted the delegation of authority in the succeeding clauses. Congress, having stated in Section 9 as to what particular structures its specific consent should be required, intended to leave to the Secre-

tary of War, acting on the recommendation of the Chief of Engineers, the determination of what should be approved and authorized in the classes of cases described in the second and third clauses of Section 10. If the section were construed to require a special authorization by Congress whenever in any aspect it might be considered that there was an obstruction to navigable capacity, none of the undertakings specifically provided for in the second and third clauses of Section 10 could safely be undertaken without a special authorization of Congress. *We do not think this was intended.* [Italics ours.] The Supreme Court of Maine in *Maine Water Co.* v. *Knickerbocker Steam Towage Co.*, 99 Me. 473, took the same general view in construction of the same section. It held that the broad words of the first clause of that section were not intended to limit the second and third clauses and that Congress's purpose was a direct prohibition of what was forbidden by them except when affirmatively approved by the Chief of Engineers and the Secretary of War. We concur in this view.

"The true intent of the Act of Congress was that unreasonable obstructions to navigation and navigable capacity were to be prohibited, and in the cases described in the second and third clauses of Section 10, the Secretary of War, acting on the recommendation of the Chief of Engineers, was authorized to determine what in the particular cases constituted an unreasonable obstruction."

Contemporary Construction of Section 10.

The Court (at p. 413) then adverts to and approves the contemporary construction of section 10 by the War Department, especially as revealed by the Opinion of the Acting Attorney General to the Secretary of War (February

13, 1925), 34 Op. Atty. Gen. 410, 416, where the Acting Attorney General says:

> "In my opinion Congress thus intended to delegate to the Chief of Engineers and the Secretary of War an administrative authority to determine a fact; and if they were of opinion that the use of navigable waters in a certain case was not such an impairment of their navigability as to require the prohibition of Congress, then the construction was 'affirmatively authorized by Congress,' because the administrative agency to which Congress had delegated the ascertainment of the facts had found the fact to be that such use was not for the time being an impairment of navigable capacity such as Congress intended to prohibit.
>
> "I am informed that for a long period of years it has been the practice of the War Department to issue permits under section 10 of the Act of March 3, 1899, without requiring that the particular project be first authorized by special Act of Congress, and that was the policy of the War Department in the specific case of the Sanitary District of Chicago."

The following language of the opinion in *Wisconsin* v. *Illinois and Sanitary District* shows that the court clearly had in mind the precise nature of the determination of fact thus left by Congress to the Secretary of War and to the Chief of Engineers (at p. 414):

> "But it is said the construction thus favored would constitute it a delegation by Congress of legislative power and invalid. We do not think so. The determination of the amount that could be safely taken from the Lake is one that is shown by the evidence to be a peculiarly expert question. It is such a question as this that is naturally within the executive function that can be deputed by Congress. . . .

"The construction of Section 10 of the Act of March 3, 1899, was settled by this Court in the decision of the first Chicago Drainage Canal case in 266 U. S. 405, 429. The decision there reached and the decree entered can not be sustained, except on the theory that the Court decided first that Congress had exercised the power to prevent injury to the navigability of Lake Michigan and the other lakes and rivers in the Great Lakes watershed, and second that it could properly and validly confer the administrative function of passing on the issue of unlawful injury or otherwise on the Secretary of War, and that it had done so."

War Department Action in Present Case.

The action of the War Department upon the Massachusetts applications for approval of the contemplated diversions has been fully set out above (see *supra*, pp. 5-6; see Amended Answer, pp. 5-8; Appendices "B" and "C," pp. 12-32; Reprint of Answer, pp. 81-102). It must be taken as true (since there is no allegation in the complaint to the contrary) that the appropriate officials of the War Department—

1. Acted in good faith.

2. Made a reasonable, proper, and warranted finding of fact that the proposed diversion from the Ware river would have no adverse effect on navigation.

3. Made a similar finding of fact with respect to the Swift diversion (subject to the limitations contained in the finding. See Amended Answer, Appendix "C," pp. 19-32; Reprint of Answer, pp. 89-102).

4. Acted in all respects within the scope of their duty under section 10, which was—

(*a*) to approve or waive objection to the project, though for a purpose not connected with the improvement of navi-

gation, if the execution of the project would have no unreasonable adverse effect on navigation;

(*b*) to withhold approval if the navigable capacity of existing waterways would be unreasonably impaired by the execution of the project.

It is, of course, clearly unnecessary for the Secretary to deny permission for a present diversion which is not harmful to navigation, merely because at some future date a project in aid of navigation may require, for purposes of storage for use in seasons of low water, the water now proposed to be diverted. The Secretary is bound to look only at the situation as it exists at the time of granting the application.

> *Louisville Bridge Co.* v. *United States*, 242 U.S. 409, 425.

This Court will not entertain an original bill seeking relief for a fanciful injury conceivably to be suffered in the distant future.

> *New York* v. *Illinois*, 274 U.S. 488, 490.
> *Florida* v. *Mellon*, 273 U.S. 12, 18.

No War Department Permit Needed for Structures in Non-Navigable Tributaries of Navigable Streams.

A large portion of the contentions upon the issue of navigability in the present Connecticut motions rests upon some theory that Massachusetts requires the permission of the Congress under sections 9 and 10 of the Act of March 3, 1899, before erecting a dam in the valley of the *non*-navigable Swift river (see *e.g.*, Mot. to Dismiss, pars. 3, 4, 6, 7, 9, pp. 6-8; Mot. to Strike Out, par. 8, esp. pp. 23-24). Such a contention, pushed to its logical conclusion, would require the consent of Congress before the smallest mill dam could be built on the smallest stream, if that stream flowed eventually into a navigable river. This con-

tention of Connecticut is, we submit, entirely frivolous. The plain words of section 9 ("any . . . dam, dike . . . in any . . . *navigable river or other navigable water*"—see *supra*, p. 9) and of section 10 ("or other structure in any . . . navigable river, or other water of the United States" —see *supra*, p. 10) indicate beyond any doubt that Congress intended to regulate only the erection of structures actually placed in the *navigable* portions of *navigable* streams—and in no way intended to do what it has probably no constitutional power to do, *i.e.*, to regulate the construction of works in non-navigable streams. If there were any room for doubt as to the meaning of sections 9 and 10, we submit that this Court should adhere to its ordinary rule of statutory construction and adopt (as between a statutory construction which raises strong doubts as to the constitutionality of an act of Congress and another construction which renders the statute unquestionably valid) the construction which leaves no room for any holding or argument that the legislative department has exceeded its powers.

> *Richmond Screw Anchor Company* v. *United States*, 275 U.S. 331, 346.
> *Blodgett* v. *Holden*, 275 U.S. 142, 148.

This Court has made it clear that section 9 would be construed to apply only to the specific structures therein mentioned.

> *Wisconsin* v. *Illinois*, 278 U.S. 367, 412-413 (quoted *supra*, p. 16).

No structures in non-navigable streams are mentioned in section 9, so it is certain that no authorization by act of Congress is necessary before Massachusetts or any riparian owner can build a dam in the non-navigable Swift river. We submit that it is equally certain that the second clause of section 10 applies only to structures actually placed in

navigable waters of the United States and that the section does not apply to any structure in a non-navigable stream. It is, of course, true that the construction of a dam in a non-navigable stream in and of itself has no necessary effect upon the navigable capacity of any navigable water into which the non-navigable stream may flow. For that reason there is no basis for Congressional control of the *erection* of dams in *non*-navigable waters. The *use* of such dams in such a way as to create an obstruction to the navigable capacity of any navigable water of the United States is, of course, subject to the Congressional control, which has been delegated by section 10 to the Secretary of War and to the Chief of Engineers.

B. The Determinations of the Secretary of War upon the Contemplated Swift and Ware Diversions Constitute a Valid Authorization of those Diversions so Far as the Question of Navigability is Concerned.

1. The correctness of the Secretary's determination cannot be reviewed, in the absence of proof of bad faith or failure to comply with applicable procedural requirements.

This Court has always held that Congress had full constitutional authority to decide what things constituted obstructions to navigation and what things did not. The cases on the subject are comprehensively reviewed in the Report of the Special Master in the case of *Wisconsin* v. *Illinois and Sanitary District* (see pp. 161-165). The Special Master summarizes his conclusions (at p. 164):

> "The question whether such an abstraction should be altogether prohibited, or the extent to which it should be permitted with regard to the interests of navigation, when and in what circumstances and in what amount a diversion of water from the lake would constitute an obstruction to navigation, are questions

> within the power of Congress to decide in the exercise of its control over navigable waters for the purposes of navigation. When these questions have been determined by Congress, or under its authority validly conferred, they are not open to reconsideration by the court."

When the *Wisconsin* case (278 U.S. 367) was decided by this Court, it cut under the rule of law laid down by the Master and decided, as a matter of equity between two parties (properly before the Court acting within its original jurisdiction), that one party could not be allowed, by committing a nuisance, to create a situation which made necessary a remedial permit from the Secretary of War. The Secretary in 1925 was faced with a situation of fact and upon that situation made a valid determination in the interests of navigation. This Court in no sense disapproved the propriety of that determination, but held it proper. The Court, however, did order that the Sanitary District stop its inequitable conduct so that the Secretary would not be forced to a determination which would result in an impairment of existing navigable capacity on the Lakes. The finality of the Secretary's determination upon a given set of facts was, we submit, in no degree questioned, and the language of the *Wisconsin* case (especially at pp. 413-414) gives every indication that this Court approved the conclusion of the special master following earlier decisions of this Court:

1. That Congress could itself finally determine whether a diversion would obstruct navigable capacity.

2. That Congress could delegate that duty to the Secretary of War and his staff of expert subordinates, who were particularly fitted to make the determination of fact.

3. That the determination made in good faith was not subject to direct judicial review.

The earlier cases raise the problem more directly and uniformly hold that where the Secretary is acting to aid navigation, or is indicating that there is no injury to the Federal interest in the maintenance of navigation involved in a particular project, his determinations of fact have always been treated as final, by this Court, and as not subject to judicial review.

> *Pennsylvania* v. *Wheeling Bridge Co.*, 18 How. 421, 430, as affecting s.c. 13 How. 518, 625.
>
> *South Carolina* v. *Georgia*, 93 U.S. 4, 12.
>
> *Miller* v. *Mayor*, 109 U.S. 385, 393, 395.
>
> *Monongahela Bridge Co.* v. *United States*, 216 U.S. 177, 193.
>
> *Philadelphia Co.* v. *Stimson*, 223 U.S. 605, 635, and cases there cited.
>
> *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 64-65.
>
> *Louisville Bridge Co.* v. *United States*, 242 U.S. 409.
>
> *Southern Pacific Co.* v. *Olympian Dredging Co.*, 260 U.S. 205, 210, and cases cited.

The *Monongahela Bridge Co.* case is explicit upon the question. The Secretary of War (the present Chief Justice), acting under section 18 of the Act of March 3, 1899 (30 STAT. AT L. 1151, 1153, U.S. Code, Tit. 33, § 502), had ordered that the bridge there in question be so altered as to render it no longer an obstruction to navigation. A criminal information was filed stating non-compliance by the defendant company with the terms of the Secretary's order and the jury returned a verdict of guilty. By a motion in arrest of judgment the constitutionality of the Act of 1899 was contested. The motion was denied and a fine imposed. This Court upon writ of error held:

1. That the Act of March 3, 1899, laid down a (at p. 192) "general rule, applicable to all navigable waters, that free navigation should not be hampered by unreasonable obstructions . . . ; that . . . Congress charged the Secretary of War with the duty of ascertaining, in each case, . . . whether the particular bridge came within the general rule prescribed; that any other method was impracticable in view of the vast and varied interests of the Nation requiring legislation . . ."

2. That the Secretary must not act in arbitrary fashion, but must give notice and an opportunity to be heard to parties interested, and must allow a reasonable time for alterations. (Parenthetically, it may be here pointed out that there is no allegation in the bill, or in the pending motions in the case at bar, that the State of Connecticut has not had full opportunity to present all her claims. Allegations which affirmatively show not only a comprehensive study of the whole situation by the War Department, but also that Connecticut has been heard at length by the Secretary and his subordinates at all stages of the proceedings are contained in the Amended Answer, p. 7; see also Appendices "B" and "C," pp. 12-32; Reprint of Answer, pp. 8-9, 81-102).

3. That the decision of the Secretary, made in good faith, is final to all intents and purposes and that (at p. 195)—

> "It was not for the jury to weigh the evidence and determine according to *their* judgment, as to what the necessities of navigation required, or whether the bridge was an unreasonable obstruction. The jury might have differed from the Secretary. That was immaterial; for Congress intended by its legislation to give the same force and effect to the decision of the Secretary of War that would have been accorded to direct action by it on the subject. It is for Congress, under

the Constitution, to regulate the right of navigation by all appropriate means, to declare what is necessary to be done in order to free navigation from obstruction, and to prescribe the way in which the question of obstruction shall be determined. Its action in the premises cannot be revised or ignored by the courts or by juries, except that when it provides for an investigation of the facts, upon notice and after hearing, before final action is taken, the courts can see to it that Executive officers conform their action to the mode prescribed by Congress."

2. Congress having undertaken a comprehensive scheme for the protection of navigation, the whole subject-matter, so far as within the scope of existing Congressional regulation, is the exclusive concern of Congress and of the War Department, by delegation of the power of Congress.

It has frequently been held that, by the provisions of the Act of September 19, 1890 (26 STAT. AT L. 453, 454), and by the acts amending the 1890 act, Congress has assumed jurisdiction of the subject of obstructions to navigation in accordance with a policy of direct and general control over the navigable waters of the United States.

Southern Pacific Co. v. *Olympian Dredging Co.*, 260 U.S. 205, 207-208.
Sanitary District v. *United States*, 266 U.S. 405, 425-426, 428-429.

The 1890 act and the 1899 amendments (*supra*, pp. 14-15) are an exercise of the power to keep open and free from any obstructions to their navigation all of the navigable waters within the United States which are accessible from a State other than those States in which they lie.

United States v. *Chandler-Dunbar Co.*, 229 U.S. 53, 62-65, and cases cited.

See *Gilman* v. *Philadelphia*, 3 Wall. 713, 724.
Gibson v. *United States*, 166 U.S. 269, 271.

In the *Chandler-Dunbar* case, *supra*, at p. 64, it was said:

"So unfettered is this control of Congress over the navigable streams of the country that its judgment as to whether a construction in or over such a river is or is not an obstacle and a hindrance to navigation, is conclusive. Such judgment and determination is the exercise of legislative power in respect of a subject wholly within its control.

"In *Pennsylvania* v. *Wheeling Bridge Company*, 18 How. 421, 430, this court, upon the facts in evidence, held that a bridge over the Ohio River, constructed under an act of the State of Virginia, created an obstruction to navigation, and was a nuisance which should be removed. Before the decree was executed Congress declared the bridge a lawful structure and not an obstruction. This court thereupon refused to issue a mandate for carrying into effect its own decree, saying:

"'Although it still may be an obstruction in fact, it is not so in the contemplation of law. We have already said, and the principle is undoubted, that the act of the legislature of Virginia conferred full authority to erect and maintain the bridge, subject to the exercise of the power of Congress to regulate the navigation of the river. That body having in the exercise of this power, regulated the navigation consistent with its preservation and continuation, the authority to maintain it would seem to be complete. That authority combines the concurrent powers of both governments, State and Federal, which, if not sufficient, certainly none can be found in our system of government.'"

The finality of the decision of the War Department officials upon the issue of obstruction, so far as direct attack upon that decision is concerned, is definitely settled by the opinions of this Honorable Court, cited *supra*, pp. 24-25. We contend, however, that it is equally well settled that the decision of the Department is fully as final when attacked collaterally in proceedings to which neither the Department nor the United States is a party. When the waiver or permit of the War Department is relied upon as an authorization or defense, it is, we submit, conclusive of the issue of obstruction or injury to navigation.

This is certainly true when the existence of an obstruction to navigation becomes of importance in litigation as between private parties.

> *Southern Pacific Co.* v. *Olympian Dredging Co.*, 260 U.S. 205, 207-208, 209-210, and cases cited.

We contend that no different rule applies when the determination of the War Department that no obstruction to navigation exists in any particular instance is raised in the course of litigation before this Honorable Court, within its original jurisdiction.

In *Kansas* v. *Colorado*, 206 U.S. 46, 85 *et seq.*, this Honorable Court, in considering the nature of its original jurisdiction as between States, took a distinction as between the method of determining issues over which the Federal Government had controlling power and the method of determining other justiciable issues between the States as to which this Court as a *quasi*-international tribunal had final power. So far as the issues in the case were subject to national control, the Court intimated that the action, if any, of the Federal Government within its proper constitutional sphere would be treated as of primary importance as governing the national phases of the situation.

"Is the question one solely between the States or is the matter subject to national legislative regulation, and, if the latter, to what extent has that regulation been carried? Clearly this controversy is one of a justiciable nature. The right to the flow of a stream was one recognized at common law, for a trespass upon which a cause of action existed.

"The primary question is, of course, of national control. For, if the Nation has a right to regulate the flow of the waters, we must inquire what it has done in the way of regulation. If it has done nothing the further question will then arise, what are the respective rights of the two States in the absence of national regulation? Congress has, by virtue of the grant to it of power to regulate commerce 'among the several States,' extensive control over the highways, natural or artificial, upon which such commerce may be carried. It may prevent or remove obstructions in the natural waterways and preserve the navigability of those ways. In *United States* v. *Rio Grande Irrigation Company*, 174 U.S. 690, in which was considered the validity of the appropriation of the water of a stream by virtue of local legislation, so far as such appropriation affected the navigability of the stream, we said (p. 703):

"'Although this power of changing the common law rule as to streams within its dominion undoubtedly belongs to each State, yet two limitations must be recognized: First, that in the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the Government property. Second, that it is limited by the superior power of the General Government to secure the uninterrupted navigability

of all navigable streams within the limits of the United States.

"'In other words, the jurisdiction of the General Government over interstate commerce and its natural highways vests in that Government the right to take all needed measures to preserve the navigability of the navigable watercourses of the country even against any state action.'"

See also *Missouri* v. *Illinois*, 200 U.S. 496, 520.

We submit that the quoted reasoning in *Kansas* v. *Colorado* indicates that this Court in the exercise of its original jurisdiction would give effect to a determination by the appropriate department of the Federal Government of an issue over which Congress had assumed to exercise the powers delegated to it under the Constitution. In the case at bar, therefore, it would follow that the determination by Congress (through its properly created administrative agents in the War Department, see *supra*, pp. 5-6) that the proposed Ware and Swift diversions will not obstruct navigation should be regarded in this controversy as conclusive, so far as the issue of the effect of the diversions upon navigation is concerned.

In the face of the complete regulation of the subject of navigation by Congress and in the light of the cases cited, *supra*, pp. 26-28, it is submitted that the contention in the Connecticut brief (at p. 36 *et seq.*) that Connecticut has an interest as *quasi*-sovereign in the maintenance of the navigable capacity of the Connecticut river for purely *intra*state commerce, is without merit.

C. Only the Navigability Issue is Concluded by the War Department Findings.

Massachusetts does not contend that this Court has not full jurisdiction to determine what the effect of the proposed diversions will be upon interests, other than interests of navigation, of the State of Connecticut and its citizens. Congress (and its administrative agents, the Secretary of War and the Chief of Engineers) only have power to determine what the effect of the proposed diversions will be upon navigation.

See *United States* v. *River Rouge Improvement Co.*, 269 U.S. 411, 419, and cases cited.

It by no means necessarily follows that a diversion which is innocuous so far as navigation is concerned may not cause damage to other important interests—*e.g.*, health, soil fertility, development of power, etc. We contend, however, that the diversions contemplated will have no adverse effect upon any interest of the State of Connecticut either as a proprietor or as *parens patriae*, or upon the inhabitants of Connecticut. The answer—

(*a*) by denying injury in fact to Connecticut or its inhabitants (see *supra*, pp. 2-3);

(*b*) by alleging that the proposed diversions will in fact constitute a reasonable user by Massachusetts of the waters of the Connecticut river valley (see *supra*, pp. 3-4)—properly raises issues of fact for this Court to decide; issues which have no national aspect (see *Kansas* v. *Colorado*, 206 U.S. 46, 85) and which are admittedly properly justiciable within the type of cases over which this Court as a *quasi*-international tribunal has final power. See *Kansas* v. *Colorado*, 206 U.S. 46, 95-96 *et seq.* (see *supra*, p. 28). See also *Wisconsin* v. *Illinois*, 278 U.S. 367, 409, and cases cited.

D. The Certain Benefit in Fact to the Navigability of the Connecticut River as the Result of the Storage of Water in the Swift River Valley (Particularly as Modified by the War Department Findings) Strengthens the Necessity of Giving to the War Department Decisions Conclusive Effect upon the Issue of Navigability.

The Commonwealth of Massachusetts will endeavor to prove that the limitations placed upon the diversions, both by the Massachusetts legislation and by the approval granted by the War Department, will cause an increased flow in the Connecticut river during dry seasons, when water is most needed for purposes of navigation (and incidentally for purposes of dilution of sewerage), over and above the flow which would normally occur. This will result from the release of stored waters in excess of the actual flow in the Swift river, on a considerable number of days each summer (see Answer, pars. 14, 16, 17, pp. 11, 12, 15, 19; Reprint of Answer, pp. 14-15, 22; Amended Answer, pars. 2, 3, pp. 9, 10; Appendix "C," esp. at pp. 29-30; Reprint of Answer, pp. 12-13, 99-100).

By the terms of Mass. St. 1927, c. 321, §1 (Answer, p. 49; Reprint of Answer, pp. 51-53), Massachusetts must in effect guarantee a flow in the Swift river at Bondsville, Massachusetts (below the point of proposed diversion), of twenty million (20,000,000) gallons a day, whether or not such a flow would otherwise be running in the river. By the terms of the War Department finding (Amended Answer, Appendix "C," pp. 29-30; Reprint of Answer, pp. 99-100) a further flow in the Swift river must be guaranteed by Massachusetts regardless of what the stream flow would be, were there no storage reservoir or no diversion. The War Department finds in its above-mentioned decision that when the gauge at Sunderland, Massachusetts (about twenty miles above Chicopee on the Connecticut river), shows a discharge of 4900 cubic feet per second, the

gauge at Hartford on the average shows a reading of 2.1 feet. A discharge of 4650 cubic feet per second at Sunderland corresponds to a gauge height at Hartford of 2.0 feet. The War Department decision then proceeds (Amended Answer, pp. 29-30; Reprint of Answer, pp. 99-100):

> "(e) From the studies of past records it appears there will be no substantial alteration or modification of the condition or navigable capacity of the channel of the navigable portion of the Connecticut River if the flow of water from the Swift River as provided in the terms of Chapter 321, of the Acts of 1927 (Massachusetts) be augmented during the critical period from June 1 to November 30, both inclusive, so that the measured rate of discharge on the Swift River shall be 70 cubic feet per second on such days as the United States Geological Survey gauge at Sunderland, Massachusetts indicates the discharge of the Connecticut River at that point to be less than 4900 cubic feet per second and more than 4650 cubic feet per second and shall be further augmented so that the measured rate of discharge past the impounding dam on the Swift river shall be 110 cubic feet per second on such days as the Geological Survey gauge at Sunderland, Massachusetts indicates the discharge on the Connecticut River at that point to be 4650 cubic feet per second or less."

Thus Massachusetts must guarantee a flow in the Swift river whenever certain circumstances of dry-season flow exist in the Connecticut river, regardless of the actual state of the flow of the Swift river.

The augmented flow in the Connecticut river thus required by the War Department is a flow which would not occur except for the Massachusetts project. It is a flow

furnished, at the expense of Massachusetts, in aid of navigation, in the nature of compensation for a flow taken during flood seasons, which is of no use (and indeed often a positive harm) to navigation and to the riparian owners of Connecticut land.

The action of the War Department in deciding that the project (with modifications) will not injuriously affect navigation can thus be said not only to be a waiver of all objection to the project from the standpoint of the Federal interest in the maintenance of navigation, but also to be equivalent to a positive authorization of a project to some extent of material assistance to navigation. The action of the War Department should thus, because of the determination that the project is to some extent of benefit to navigation, be given conclusive effect here so far as the issue of navigability is raised by the pleadings.

E. The Allegations both of the Original and of the Amended Answer Deny that Any Injury to Navigation is Caused by the Project. Issues of Fact are thus Raised which are Appropriate for Consideration by the Special Master Appointed by this Court; Provided that this Court should Deem it Proper, Notwithstanding the Action of the War Department, to Consider the Issue of the Effect of the Project upon Navigation.

Although Massachusetts contends that the finding of the War Department as to the effect of the project upon navigation is conclusive in this case upon that issue, it has none the less denied that the proposed diversion (either as originally contemplated or as limited by the terms of the War Department findings will in any way adversely affect navigation (Answer, pars. 14, 16, 17, 20, pp. 11, 14-15, 18, 22; Amended Answer, pars. 2-3, pp. 9, 10; Reprint of Answer, pp. 12-13, 15, 17-18, 33). In the event that this Court in its discretion should determine that the issue of navigability

is not determined by the action of the Secretary of War, pleaded fully by Massachusetts and, therefore, admitted by Connecticut for the purpose of preliminary motions (such as the present motions of Connecticut raising questions of law solely upon technical admissions of fact made by motions in the nature of demurrers to the answer); it is submitted that the defendant's answer as amended raises sufficient issues of fact upon the question of navigability to make it necessary for this Court to submit the case to the Special Master for the purpose of obtaining adequate findings of fact in accordance with its usual custom.

See, *e.g.*, *Kansas* v. *Colorado*, 185 U.S. 125, esp. 146-147; 206 U.S. 46, esp. 99-100 *et seq.*
Wisconsin v. *Illinois*, 270 U.S. 634; 278 U.S. 367, 370.

II.

THE LAW APPLICABLE TO THE CASE AT BAR IS TO BE DETERMINED BY THIS HONORABLE COURT IN THE LIGHT OF THE WHOLE SITUATION OF FACT: HAVING DUE REGARD TO THE DECISIONS OF THIS COURT IN OTHER INTERSTATE CASES, TO THE MUNICIPAL LAW IN FORCE IN MASSACHUSETTS AND CONNECTICUT, TO PERTINENT PROVISIONS OF INTERNATIONAL LAW AND PRACTICES, AND TO THE CUSTOMARY METHODS OF OBTAINING AND USING WATER IN THE TWO STATES HERE INVOLVED. NO ONE OF THESE FACTORS IS ALL IMPORTANT.

The contentions of Connecticut upon the present motions fall roughly into three groups (see analyses, *supra*, pp. 7-10):

1. Connecticut's contentions as to the legality of the proposed diversion so far as concerns the public interest in the maintenance of navigation. These contentions we have discussed *supra*, pp. 14-35.

2. Connecticut's contentions that the proposed diversion, or any similar diversion regardless of its extent, would be illegal as involving an invasion of the sovereign rights of Connecticut under riparian law and under the *quasi*-international law applied in interstate disputes by this Court.

3. Connecticut's contentions that the facts set up in the answer which tend to show that Connecticut is not damaged and that Boston is facing a severe emergency are immaterial—and that such facts cannot properly be considered by this Court even as the basis of equitable defenses.

This Court has in past decisions indicated the basis upon which it will determine the principles of law applicable to a controversy such as this between two *quasi*-sovereign States. Apart from the issues of navigability, we submit that this Honorable Court should give some force and effect to each of the following factors:

1. Principles laid down by this Honorable Court in other interstate cases involving the use of interstate streams;

2. International and interstate practices and precedents as to the use of international and interstate streams;

3. The theory and the practical application of riparian and water law in the two contending States, particularly so far as domestic water supplies are concerned; as revealed not only by the decided cases, but also by the legislative policy of the States as expressed in general and special acts.

4. The necessity of expanding and developing the existing principle of international law giving a priority of right to make use of water for domestic purposes as compared to the use of the same water for other purposes.

A. The Municipal Riparian Law of Connecticut and Massachusetts is Not Controlling. It is merely One Element of the Law of this Case.

It is not disputed by Massachusetts that Connecticut has a standing as *parens patriae* to raise for the determination of this Court issues (other than issues concerning navigability) with respect to the effect of the proposed Massachusetts diversions. This right of the State to sue in behalf of its own proprietary interests and the general welfare of its people is established by many decisions of this Court.

> *Kansas* v. *Colorado*, 185 U.S. 125, 141 *et seq.*; 206 U.S. 46, 80 *et seq.*
> *Missouri* v. *Illinois*, 180 U.S. 208, 241; 200 U.S. 496, 519.
> *New York* v. *New Jersey*, 256 U.S. 296, 302.
> *North Dakota* v. *Minnesota*, 263 U.S. 365, 372 *et seq.*
> *Wisconsin* v. *Illinois*, 278 U.S. 367, 409, and cases cited.

This Court not only has not consistently applied the law of any particular jurisdiction to interstate controversies involving the use of water of interstate streams, but it has studiously avoided tying its hands for the future by more than a determination of the guiding principle applicable to the case before it upon the particular facts actually before it for consideration. The doctrine of the decisions is perhaps best expressed in the language of Mr. Chief Justice *Fuller* in *Kansas* v. *Colorado*, 185 U.S. 125, at pp. 146-147:

> "Sitting, as it were, as an international, as well as a domestic tribunal, we apply Federal law, state law, and international law, as the exigencies of the particular case may demand, and we are unwilling, in this

case, to proceed on the mere technical admissions made by the demurrer."

This Court has recognized that an interstate controversy of this nature "rises . . . above a mere question of local private right and involves a matter of state interest, and must be considered from that standpoint" (Mr. Justice *Brewer* in *Kansas* v. *Colorado*, 206 U.S. 46, at 99). In the case last cited the Court goes on, at page 100, to discuss the situation before it as it would be if involving solely individual riparian proprietors. In that case the Court said:

> "The question would be one of legal right, narrowed to place, amount of flow and freedom from pollution.
>
> "We do not intimate that entirely different considerations obtain in a controversy between two States. Colorado could not be upheld in appropriating the entire flow of the Arkansas River, on the ground that it is willing to give, and does give, to Kansas something else which may be considered of equal value. That would be equivalent to this court's making a contract between the two States, and that it is not authorized to do. But we are justified in looking at the question not narrowly and solely as to the amount of the flow in the channel of the Arkansas River, inquiring merely whether any portion thereof is appropriated by Colorado, but we may properly consider what, in case a portion of that flow is appropriated by Colorado, are the effects of such appropriation upon Kansas territory."

This language, together with other language found at pages 96-97 of the same opinion, shows the breadth of view taken by this Court when deciding important interstate disputes, which, in the case of completely independent sovereign States, would be settled either by diplomacy or by resort to war. It is, of course, true that the law of the

States involved is one of the elements given consideration by this Court in such disputes.

See, *e.g.*, *Wyoming* v. *Colorado*, 259 U.S. 419, 458, 464 *et seq.*
Kansas v. *Colorado*, 206 U.S. 46, 94.

There is ample authority to the effect that the local law in force in either State is not conclusive, when this Court is acting in its *quasi*-international capacity.

See, *e.g.*, Mr. Justice *Holmes* in *Missouri* v. *Illinois*, 200 U.S. 496, 519-520:

> "The Constitution extends the judicial power of the United States to controversies between two or more States and between a State and citizens of another State, and gives this court original jurisdiction in cases in which a State shall be a party. Therefore, if one State raises a controversy with another, this court must determine whether there is any principle of law and, if any, what, on which the plaintiff can recover. But the fact that this court must decide does not mean, of course, that it takes the place of a legislature. Some principles it must have power to declare. For instance, when a dispute arises about boundaries, this court must determine the line, and in doing so must be governed by rules explicitly or implicitly recognized. *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 737. It must follow and apply those rules, even if legislation of one or both of the States seems to stand in the way. *But the words of the Constitution would be a narrow ground upon which to construct and apply to the relations between States the same system of municipal law in all its details which would be applied between individuals.* If we suppose a case which did not fall within the power of Congress to regulate, the result of a declaration of rights by this court would be the estab-

> lishment of a rule which would be irrevocable by any power except that of this court to reverse its own decision, an amendment of the Constitution, or possibly an agreement between the States sanctioned by the legislature of the United States." (Italics ours.)

Broader principles than the municipal riparian law of Connecticut and of Massachusetts are therefore applicable to this cause. This is a controversy between *quasi*-sovereign States. To a very great extent the issues in this case are *quasi*-international, and the rights of the parties are fixed by international law. The Chief Justice of this Honorable Court, in a discussion of a proposed world court some years ago, phrased this principle as follows:

> "A court to administer international justice is not new. Our own Supreme Court is one. Questions arise between states not settled by the Federal Constitution or Federal statutes. In the Kansas-Colorado case, Congress had no power to control Colorado. International law alone fixed the rights between the states and the Supreme Court enforced these rights."
>
> *Hon. William H. Taft*, "Papers on the League of Nations," p. 99.

The issue in the case at bar, we submit, calls for the application of international law principles of the same sort as those which controlled the decision of the International Commission which approved the application of the City of Winnipeg for permission to divert water from a tributary of the Lake of the Woods, an international water (see *infra*, pp. 58-59).

Municipal law enters into international law as one of the elements or standards by which the obligation of a sovereign to do equity to another sovereign is measured.

See, *e.g.*, *Kansas* v. *Colorado*, 206 U.S. 46, 102-105.
Wyoming v. *Colorado*, 259 U.S. 419, 466-467.

It is not, we submit, the only element which will be considered by this Court. In the past this Court has said that it will consider precedents, treaties, and other authorities in international law.

Kansas v. *Colorado*, 185 U.S. 125, 146-147.

It has applied a modified form of international law in interstate controversies—

Missouri v. *Illinois*, 200 U.S. 496, 518-522;
Alabama v. *Georgia*, 23 How. 505, 513;
Nebraska v. *Iowa*, 143 U.S. 359, 361-368 (in which international law authorities were treated as decisive of the case);
Louisiana v. *Mississippi*, 202 U.S. 1, 25, 49-52;
See *Arkansas* v. *Tennessee*, 246 U.S. 158, 172-174—

except, of course, where, under the Constitution of the United States, Federal law is supreme.

See, *e.g.*, *Wisconsin* v. *Illinois*, 278 U.S. 367 (navigation).
Pennsylvania v. *West Virginia*, 262 U.S. 553, 595 *et seq.* (interstate commerce).

This Court also has given great weight to commercial and economic practices with respect to matters similar to those in issue in the territory affected by the particular controversy.

See, *e.g.*, *Missouri* v. *Illinois*, 200 U.S. 496, 521-522.
Kansas v. *Colorado*, 206 U.S. 46, 101, 105 *et seq.*
Wyoming v. *Colorado*, 259 U.S. 419, 466 *et seq.*

Compare the consideration given to the practical situation in the light of the best scientific knowledge available, in *New York* v. *New Jersey*, 256 U.S. 296, 309 *et seq.*

The willingness of this Honorable Court to examine not only the technical rules of law in force in each State, but also the prevailing practice as to the use of streams in the community, is pointed out by Mr. Justice *Holmes* in *Missouri* v. *Illinois*, *supra*, at pp. 521-522:

> "As to the principle to be laid down the caution necessary is manifest. It is a question of the first magnitude whether the destiny of the great rivers is to be the sewers of the cities along their banks or to be protected against everything which threatens their purity. To decide the whole matter at one blow by an irrevocable fiat would be at least premature. If we are to judge by what the plaintiff itself permits, the discharge of sewage into the Mississippi by cities and towns is to be expected. We believe that the practice of discharging into the river is general along its banks, except where the levees of Louisiana have led to a different course. The argument for the plaintiff asserts it to be proper within certain limits. These are facts to be considered. Even in cases between individuals some consideration is given to the practical course of events. In the black country of England parties would not be expected to stand upon extreme rights. *St. Helen's Smelting Co.* v. *Tipping*, 11 H. L. C. 642. See *Boston Ferrule Co.* v. *Hills*, 159 Massachusetts, 147, 150. Where, as here, the plaintiff has sovereign powers and deliberately permits discharges similar to those of which it complains, it not only offers a standard to which the defendant has the right to appeal, but, as some of those discharges are above the intake of St. Louis, it warrants the defendant in demanding the strictest proof that the plaintiff's own conduct does

not produce the result, or at least so conduce to it that the courts should not be curious to apportion the blame."

We submit, therefore, upon the authorities cited, that it is clear that the municipal law of the two States is not the only basis of legal principle upon which this cause will be decided; and that the Court will give due regard to the economic requirements of the two States involved; to principles, established by this Court and by international law, of equitable division of the benefits of the waters of interstate and international rivers as between States; and to geographical facts which require the adoption of the principle that a claim for the use of water for drinking and domestic purposes is to be given consideration ahead of a claim to use potable water for any other purpose, so long as the Federal interest in the maintenance of navigation is not injured. We further submit that until the facts of this case are found by the Master (appointed December 2, 1929), this Honorable Court will not be in a position to decide how much weight is to be given to each of the elements mentioned in determining the law applicable to the cause.

B. The Decisions of this Court Establish the Principle of the Equitable Division of the Benefits Arising from an Interstate River among the States through which the River Passes.

Massachusetts contends that this Honorable Court has consistently recognized that a *quasi*-sovereign State may make use of its fair share of the benefits accruing from the presence of a portion of an interstate river within its borders. That use must be reasonable in the light of local conditions of terrain, geography, and rainfall. It must have due regard to commercial and business custom in the

community as to the use of water. It is influenced in part by local municipal law. None the less, we submit that this Court has uniformly, in the exercise of its interstate jurisdiction, laid down a principle that under all the circumstances each State bordering upon an interstate stream is entitled to make what is substantially a permanent abstraction of a portion of the waters or of the beneficial use of the stream, providing the abstraction does not exceed the amount to which the State, as a *quasi*-sovereign, is entitled by international law as its share under an equitable division of the waters of the stream. Chronologically, the principal decisions are as follows:

Missouri v. *Illinois.*

Missouri v. *Illinois*, 180 U.S. 208 (1901). This was a bill in equity seeking to enjoin the discharge of Chicago's sewerage into the Mississippi river by means of the Sanitary Canal. Upon demurrer to the bill, this Honorable Court decided (1) that the bill presented a justiciable controversy under the Constitution and (2) that the allegations of the bill, if found to be true, might warrant equitable relief to restrain the commission. The demurrers were overruled and leave was given to file answers to the bill. In 200 U.S. 496 (1906), the Court considered the testimony taken as to the effect of the Illinois project, which in substance was a permanent appropriation by Illinois of a portion of the potential beneficial use of the Mississippi watershed for the purpose of sewerage dilution. The Court first determined that there was no superior Federal right (*e.g.*, navigation) involved (at pp. 518-520). It then determined that the Court must under the Constitution decide whether the conduct of Illinois was a proper exercise of sovereign right, which did not impinge on the equal sovereign rights of Missouri. That the decision must rest upon no narrow application of a local system of municipal

law was clearly set forth by Mr. Justice *Holmes* at pp. 419-421, and it is there suggested that the principles of international law are of guiding force. The Court, relying on the common practice of making use of the Mississippi and its tributaries for sewerage purposes, judged Missouri by the standards she employed within her own borders (at pp. 521-522) and found that the evidence did not clearly establish the commission of a nuisance by Illinois (at pp. 523-526). In accordance with the principle stated in the opinion (at pp. 520-521), the Court decided that the alleged injury was not sufficiently serious to justify equitable relief against a sovereign State.

The decision was in substance a holding by this Court that Illinois had not made use of the stream in excess of its equitable share of the beneficial use of the waters. The case, when analyzed, involves an application of the principle of equitable division of beneficial user.

Kansas v. *Colorado.*

Kansas v. *Colorado*, 185 U.S. 125 (1902); 206 U.S. 46 (1907). This was a bill in equity brought by Kansas to enjoin the permanent diversion of water from the Arkansas river by Colorado for the purpose of irrigation. Upon demurrer the Court decided that the case presented a justiciable interstate controversy (at p. 145), but declined to "proceed on the mere technical admissions made by the demurrer" to a decision of the case upon its merits, in view of the fact that the applicable law depended upon the "exigencies of the particular case" (at p. 147). The demurrer was overruled. After the taking of testimony, this Court considered the case upon its merits (206 U.S. 46). The decision affirmed the jurisdiction of the Court to decide the controversy as rising "above a mere question of local private right" and as "a matter of state interest" (at p. 99), which must be determined upon a broad consider-

ation of all the geographical, natural, and economic circumstances. The Court devoted some pages (pp. 95 *et seq.*) to the discussion of the law applicable to the case. The following language, beginning at p. 97, seems to indicate beyond the shadow of a doubt that the Court believed that it was bound to apply in the case the principles of international law:

> "As Congress cannot make compacts between the States, as it cannot, in respect to certain matters, by legislation compel their separate action, disputes between them must be settled either by force or else by appeal to tribunals empowered to determine the right and wrong thereof. Force under our system of Government is eliminated. The clear language of the Constitution vests in this court the power to settle those disputes. We have exercised that power in a variety of instances, determining in the several instances the justice of the dispute. Nor is our jurisdiction ousted, even if, because Kansas and Colorado are States sovereign and independent in local matters, the relations between them depend in any respect upon principles of international law. *International law is no alien in this tribunal.* In *The Paquete Habana*, 175 U.S. 677, 700, Mr. Justice Gray declared:
>
> "'International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.'
>
> * * * * * * * *
>
> "One cardinal rule, underlying all the relations of the States to each other, is that of *equality of right*. Each State stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none.

> Yet, whenever, as in the case of *Missouri* v. *Illinois*, 180 U.S. 208, the action of one State reaches through the agency of natural laws into the territory of another State, the question of the extent and the limitations of the rights of the two States becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize *the equal rights of both* and at the same time establish justice between them. In other words, through these successive disputes and decisions this court is practically building up what may not improperly be called *interstate common law*. . . . Surely here is a dispute of a justiciable nature which must and ought to be tried and determined. If the two States were absolutely independent nations it would be settled by treaty or by force. Neither of these ways being practicable, it must be settled by decision of this court." (Italics ours.)

The Doctrine of Equitable Division Applied.

In view of the fact that "Kansas . . . recognizes the right of appropriating the waters of a stream for the purposes of irrigation, subject to the condition of an *equitable* division betwen the riparian proprietors" (at p. 104), the Court denied specific relief inasmuch as the evidence failed to show that under all the applicable circumstances Colorado had permanently taken more than her fair share of the waters of the river or had done any act which worked substantial detriment to the States lower on the river (at p. 117). The Court, however, in reaching its conclusions, did not even purport to apply "the extreme rule of the common law" (at p. 105), but based its decision upon a consideration of (at p. 100) "the effect of what has been done upon the conditions in the respective States," and so adjusted "the dispute upon the basis of equality of rights

as to secure as far as possible to Colorado the benefits of irrigation without depriving Kansas of the like beneficial effects of a flowing stream." Clearly, the decision was based upon the principle of international law of equitable division of the benefits of a flowing stream subject to be appropriated as between the States having an interest in the stream. Upon no other basis can be explained the action of the Court (at pp. 113-114) in weighing the benefit to Colorado and the amount of detriment to Kansas caused by the diversion there in question. Similar language appears at p. 117, where the Court clearly points out that its guiding principle is "an equitable division of benefit" of the waters of the Arkansas as between the two States.

Equitable Division of Potential Sewage Dilution Capacity.

New York v. *New Jersey*, 256 U.S. 296 (1921), is not a case dealing with the use of an interstate stream. It does, however, deal with the claim of one State to appropriate permanently part of the beneficial use to be derived from water in which another State had some territorial interest. New York in this case sought to enjoin the Passaic Valley Sewerage project under which New Jersey proposed to dispose of the sewerage of certain cities, including Paterson and Newark, by discharging the sewerage into Upper New York Bay. The Court, after the taking of testimony, considered the case upon its merits. Jurisdiction of the cause under the Constitution was sustained on the authority of *Missouri* v. *Illinois*, 180 U.S. 208, 241, inasmuch as New York was suing in its capacity of *parens patriae* as a *quasi*-sovereign. The Court then went on to consider the evidence introduced (at p. 309)—

> ". . . subject to the rule that the burden upon the State of New York of sustaining the allegations of its bill is much greater than that imposed upon a complainant in an ordinary suit between private parties.

> Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one State at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence. *Missouri* v. *Illinois*, 200 U.S. 496."

Upon the whole situation, and after a consideration of all the circumstances, the Court denied an injunction on the ground that New York had not made out its case to be one of sufficient seriousness to warrant intervention of the Court (at p. 313), which, of course, was acting as a *quasi*-international tribunal. We submit that the decision is in effect a holding that New Jersey could not be said to have made an appropriation of more than her equitable share of the sewerage dilution capacity of the waters of Upper New York Bay, a body of water in which both States had an interest.

Wyoming v. *Colorado.*

Wyoming v. *Colorado*, 259 U.S. 419 (1922), was a case involving a diversion by Colorado of certain of the upper waters of the Laramie river, which flows from Colorado into Wyoming. The latter State sought an injunction of such diversions in Colorado as were subsequent in time to certain Wyoming diversions and as constituted an inequitable use of the waters of the stream. Much evidence was heard in the case (see p. 456), and the Court had the benefit of three exhaustive arguments, in which not only the whole geographical and economic situation was brought to its attention, but during which, also, it had before it both international and local precedents in similar cases (see esp. pp. 425-427, 431, 434-438). The Court examined at length the whole situation of fact in the light of the history of the area affected by the controversy; it considered the uses to which water had been put in the two States both in

pioneer days and after their admission as States; it considered the system of water law under which settlers in both States had turned arid desert into fertile agricultural land. From this examination the Court came to the conclusion that the *quasi*-international law principle of equitable division of use between States demanded the application of a standard in the particular controversy not unlike the appropriation theory of water rights in force in each State party to the suit (at p. 470). In this instance, therefore, sound interstate and international law dictated a "doctrine of appropriation as . . . the only basis which is consonant with the principles of right and equity applicable to such a controversy," in the light of the whole background of the case. Applying this principle, the Court examined with great care each of the claimed appropriations in each State, classified them as to priority, and by its decree permitted Colorado to continue only so much of the diversions sought to be enjoined as could be held to be proper and reasonable in view of the principle which in the particular case was deemed to result in an equitable division of the beneficial user of the stream as between the two States.

The North Dakota Case.

North Dakota v. *Minnesota*, 263 U.S. 365 (1923), involved the use by Minnesota of waters lying within its borders in such a way as to affect to some degree the amount of water in a watercourse bordering upon both States. North Dakota brought a bill in equity seeking to enjoin the operation of a drainage ditch in Minnesota which was alleged so to increase the flow into an interstate stream as to cause water to be thrown upon lands in North Dakota to their damage. The case was heard upon the facts at great length, and after the final argument to the Court upon the merits of the cause the bill was dismissed without prejudice, in an opinion by the Chief Justice. This Court

readily sustained the general jurisdiction of the Court to decide the controversy (at p. 372), in the following language:

> "The jurisdiction and procedure of this Court in controversies between States of the Union differ from those which it pursues in suits between private parties. This grows out of the history of the creation of the power, in that it was conferred by the Constitution as a substitute for the diplomatic settlement of controversies between sovereigns and a possible resort to force. The jurisdiction is therefore limited generally to disputes which, between States entirely independent, might be properly the subject of diplomatic adjustment. They must be suits 'by a State for an injury to it in its capacity of quasi-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain.' 'When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court.'"

The Court then pointed out that—

> "In such action by one State against another, the burden on the complainant State of sustaining the allegations of its complaint is much greater than that imposed upon a complainant in an ordinary suit between private parties. 'Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one State at the suit of another, the threatened invasion of rights must be of

> serious magnitude and it must be established by clear and convincing evidence.' "

And further, that—

> "The right of a State as *parens patriae* to bring suit to protect the general comfort, health, or property rights of its inhabitants threatened by the proposed or continued action of another State, by prayer for injunction, is to be differentiated from its lost power as a sovereign to present and enforce individual claims of its citizens as their trustee against a sister State" (pp. 375-376).

The opinion then goes on to consider the whole case in the light of the scientific, economic, historical, and geographical data adduced in evidence, and came to the conclusion (at p. 388) that Minnesota was not responsible for the floods complained of. This, we submit, was in substance a decision that Minnesota had not taken more than her fair and equitable share of the potential beneficial use of the waters and watercourses of an interstate watershed.

The Drainage Canal Case.

Wisconsin v. *Illinois*, 278 U.S. 367 (1929), rested largely upon the decision of questions by an application of Federal law governing the control of navigable waters. That aspect of the case has been discussed fully *supra*, at pp. 16-19. At the same time the question of whether Illinois and the Sanitary District of Chicago had made an inequitable use of the waters of the Great Lakes, without due regard to the rights of other riparian States to make an equitable use of the lakes, was present in the case. Upon the facts and the exhaustive report of the Special Master the Court found that the diversions by Chicago were not proper, largely because they were in excess of the water

which could be taken without injury to the navigable capacity of the lakes. This fact alone made it so clear that Illinois was taking more water than it had any just claim to, either under any principle of equitable division or under the Federal law applicable to navigable waters, that the point was not considered at length by this Court (see pp. 417-419). The case, however, casts no doubt upon the validity of the principle of equitable division of the beneficial user of interstate waters as between interested States, in any case where no superior Federal right, such as navigation, is involved.

Recommendations of Special Master for a Decree Recognize Prior Claim of Water Supply.

It should be noticed, however, in passing, that the report of the Special Master in the *Chicago* case, recommending a form of final decree, casts no doubt upon the equity of Chicago's claim to divert sufficient water from the lakes for domestic uses of drinking, washing, and the like. By the terms of that recommendation, recently announced (Report of the Special Master on Re-Reference, pp. 120, 143, and 147 *et seq.*), the diversion requirements of the domestic water supply of Chicago are to be met as a claim upon the waters of the lakes even ahead of the requirements of navigation. Further diversions under the proposed decree would be permitted only in the light of the necessities of navigation. The parties to the *Chicago* case, the Special Master, successive Secretaries of War, and this Honorable Court (so far as it has had occasion to consider the point *sub silentio*), apparently have felt no doubt that the claim of Chicago to a reasonable diversion for a domestic water supply was to some extent a prior lien upon the waters of the lakes, entitled to great respect unless expanded to grossly unreasonable limits. Such a doctrine of priority of claim in behalf of municipal water supplies has been

recognized in international agreements and by commentators on international law (see *infra*, pp. 55-61). It is written into the statute law of the two States involved in this controversy (see *infra*, pp. 68-79). It is significant that it is recommended by the Special Master in the *Chicago Drainage* case as an essential feature of the adjustment of an interstate controversy before this Court sitting under the Constitution as a *quasi*-international tribunal.

C. International Law Establishes the Principle of Equitable Division of the Benefits of Interstate Waters as between the Sovereigns through whose Lands the Waters Pass. In Making an Equitable Division of Beneficial Use, Due Weight Must be Given to the Comparative Benefit to be Derived by Each Sovereign from Each Particular Use. The Fundamental and Most Important Use of Water is for Quenching Thirst and for Other Domestic Purposes.

We have contended above (*supra*, pp. 37-43) that this Court applies international law whenever it is appropriate for the settlement of controversies between the *quasi*-sovereign States of the Union. The decisions cited show that precedents of action in international disputes are regarded by this Court as of great value as standards in the decision of litigation between the States. In the matter of the equitable division of interstate waters as between nations, international precedents and authorities are available which are of assistance in a cause like this, so far as the relation between two States of the United States is analogous to the relation between two nations of the world. The States in the American Union have a special position by reason of their federation. Yet the analogy between the American States and independent nations is a close one, and therefore the law of nations affords close analogies in dealing with any interstate controversy.

There is now a great body of international law concerning international rivers and other international waters, which may be drawn upon for analogies to be applied in the interstate law of waters within the United States. There are numerous rivers in the world which may be said to be international in the sense that they separate or traverse the territories of more than one State. Among the notable examples of rivers international in this sense are the Danube, the Rhine, the Elbe, the Oder, the Pruth, the Po, the Scheldt, the Nile, the Congo, the Zambesi, the Vistula, the Amazon, the Orinoco, the Rio de la Plata, the Rio Grande, the St. Lawrence, the Yukon, the Porcupine, the Stikine, the St. John, the Columbia; and during the course of the past century an elaborate body of international law has been developed with reference to these rivers.

The chief interest in international rivers during the past century was in reference to their navigation. Hence most of the international law which has been developed has to do with problems of navigation. Numerous treaties have been made, the principal object of which is to protect the common interest of States in the navigation of streams. So numerous have these treaties been, and so general is their scope, that there may now be said to be a body of international law which exists apart from any basis to be found in particular treaties.

Of course, so far as the *issues of navigation* in the case at bar are concerned, the principles established by international law are of slight assistance, inasmuch as, under the Constitution, the control of navigable waters is vested almost entirely in Congress and in those to whom Congress has delegated authority. However, to the extent that international treaties and decisions regarding freedom of navigation of international waters attempt to apply the doctrine of equitable distribution of the benefits of the navigable capacity of such waters, those authorities strengthen the doctrine which this Court has (as we have

argued *supra*, pp. 43-54) applied consistently in interstate litigation.

The Development of International Law as to Uses of Water.

While most of the international law relating to international streams has been developed with reference to problems connected with their navigation, in recent years the waters of such streams have been put to many other uses. Water is now used more and more extensively for domestic purposes such as drinking, for sanitation purposes such as the disposal of sewage, for agricultural purposes such as irrigation, for industrial purposes such as the generation of electrical power, and for other purposes unconnected with navigation. We have collected in Appendix "A" (*infra*, pp. 91-99) a number of international precedents showing the principle of equitable division as it has been stated by commentators and as it has been applied through various methods in the adjustment of international and interstate disputes. Those precedents which bear most directly upon the issues now before this Honorable Court, we shall summarize briefly here. Perhaps the most striking examples of international provision for the use of the waters of a stream are to be found in the practice of the United States, which may be studied with reference to common waters of the United States and Mexico, and to common waters of the United States and Canada.

The Priority Doctrine Recognized.

The development of our relations with Canada has frequently called for provisions concerning the diversion of certain boundary waters. By the convention of January 11, 1909, certain waters are defined as "boundary waters" and an International Joint Commission was created with jurisdiction over cases involving the use or obstruction or diversion of certain waters. Article 8 of this convention

provides principles which are to guide the International Joint Commission, among which are the following:

> "The High Contracting Parties shall have, each on its own side of the boundary, equal and similar rights in the use of the waters hereinbefore defined as boundary waters.
>
> "The following order of precedence shall be observed among the various uses enumerated hereinafter for these waters, and no use shall be permitted which tends materially to conflict with or restrain any other use which is given precedence over it in this order of precedence:
>
> "(1) Uses for domestic and sanitary purposes;
>
> "(2) Uses for navigation, including the service of canals for the purposes of navigation;
>
> "(3) Uses for power and for irrigation purposes.
>
> "The foregoing provisions shall not apply to or disturb any existing uses of boundary waters on either side of the boundary.
>
> "The requirement for an equal division may in the discretion of the Commission be suspended in cases of temporary diversions along boundary waters at points where such equal division can not be made advantageously on account of local conditions, and where such diversion does not diminish elsewhere the amount available for use on the other side" (36 STAT. AT L., 2448).

Preference to Municipal Water Supplies.

In this treaty expressly appears not only a clear recognition of the doctrine of the equitable division of the beneficial user of international waters, but also a straightforward declaration that preference is to be given to a nation desiring to use water for domestic purposes over a nation desiring to use water for some less fundamental cause. A similar recognition of the prior claim of a domestic water supply

is to be found in the recommendations for a final decree recently filed by the Special Master in the *Chicago Drainage Canal* case (see *supra*, p. 53).

One interesting controversy has arisen under the treaty of January 11, 1909 (just quoted above), the decision of which clearly recognizes the prior importance of the use of water for domestic purposes. The International Joint Commission established under the treaty handed down an opinion on January 14, 1914, concerning the application of the Greater Winnipeg Water District for the diversion and use of water from Shoal Lake and the Lake of the Woods. Shoal Lake is a tributary of the Lake of the Woods, a boundary water under the treaty. Winnipeg desired to make the diversion for domestic and sanitary purposes. The Greater Winnipeg Water District obtained the permission of the Province of Ontario, in which Shoal Lake is situated, to make such use of the water. The War Department of the United States entered an appearance before the Commission and stated that "the War Department feels that the proposed diversion by the Winnipeg Water District is so small a factor of the general problem as to be practically insignificant, and that no valid reason exists for objecting to its consummation." The town of Kenora, Ontario, however, opposed the diversion on the ground that it would lower the level of the Lake of the Woods and contended that other water was available to Winnipeg.

After thorough investigation the Commission found that the diversion was "not of any great moment" and approved the application. Its conclusion is as follows:

> "To sum up, we believe that it is absolutely necessary for the city of Winnipeg and the Greater Winnipeg Water District, the applicant, to obtain a sufficient supply of good, pure, and wholesome water; that after examining the available sources of supply, the applicant has shown that the best source, the cheapest, the

most abundant, and the purest is Shoal Lake; that the diversion of the waters of Shoal Lake and the resultant decrease of the flow of the waters of the Lake of the Woods at the outlet of the lake, is, for the present at least, practically unimportant, and without any effect upon the industries and plants established at Kenora, and, finally, that the granting of the privilege of taking the waters of Shoal Lake has been surrounded by such safeguards that all the interests are amply protected."

An agreement between the United States and Canada was signed at Washington, February 24, 1925, for regulating the level of the Lake of the Woods. Article 2 of the agreement states its object to be to secure "the most advantageous use of the waters" for "domestic and sanitary purposes, for navigation purposes, for fishing purposes, and for power, irrigation and reclamation purposes." This agreement dealing only with one particular body of water clearly recognizes not only the principle of equitable division but also the prior claim of a domestic water supply upon the waters of an international lake (see 44 STAT. AT L., 2108).

A Pending Equitable Division.

Preparatory work for a similar arrangement with Mexico, based upon the principle of equitable division, is now in progress under the authority of the Act of May 13, 1924, 43 STAT. AT L., Part I, p. 118, entitled:

> "An Act Providing for a study regarding *the equitable use* of the waters of the Rio Grande below Fort Quitman, Texas, in co-operation with the United States of Mexico." (Italics ours.)

Section 1 reads in part:

> "The President is hereby authorized to designate three special commissioners to co-operate with repre-

sentatives of the United States of Mexico in a study regarding the equitable use of the waters of the Rio Grande below Fort Quitman, Texas, with a view to their proper utilization for irrigation and other beneficial uses. One of the commissioners so appointed shall be an engineer experienced in such work. Upon completion of such study the results shall be reported to Congress."

Foreign Interstate Litigation Precedents.

Courts, other than this Honorable Court, have seldom been called upon to deal with questions relating to the division of waters between States. But the jurisprudence of the Federal Tribunal of Switzerland affords some interesting cases. In 1878 the Canton of Argovie sought to restrain the Canton of Zurich from putting into effect certain concessions which would involve the damming of the river Johenbuch, which flowed from the territory of Zurich into the territory of Argovie. The Federal Tribunal found itself competent, but dismissed the application, on the ground that equality between the cantons did not exclude the common use of the waters and did not necessitate an undiminished or uninterrupted flow of the water (*Arrêts du Tribunal Federal Suisse*, IV, p. 34). The same principle was followed in *Canton of Argovie* v. *Canton of Soleure*, *Arrêts du Tribunal Federal Suisse*, XVIII, p. 689.

Summary—Equitable Division is the Guiding Principle.

The recent developments of treaty law on the subject of the use of waters in an international stream is clearly based on an effort to assure to the States concerned an equitable division of the waters, and we submit that the principle may be said to have become established that even in the absence of conventional agreement an equitable division may be made, so that each State through whose territory a stream

flows may make an equitable use of the water. A tendency is clearly manifest, also, to distinguish between various uses which may be made of water. The hierarchy of uses will depend largely on the locality and on the special conditions prevailing with respect to the particular stream. In some cases, navigation is to be put first, perhaps; but it is significant that under some treaties it is provided that other uses should be given precedence, and that the Convention of 1909 between the United States and Canada puts before navigation "uses for domestic and sanitary purposes." No more satisfactory classification of uses can be found than in the 1909 convention, and it is significant that that classification is followed in the enumeration in the *Lake of the Woods Agreement of 1925* (see *supra*, p. 59).

In the Connecticut river watershed, of course, there can be no question of interference with navigation, in view of action taken by the War Department. It is merely a question of the propriety and equitable nature of the use being made by Massachusetts for domestic purposes.

D. Under the Municipal Law both of Connecticut and of Massachusetts, so far as it Furnishes an Analogy of Weight in this Case, the Massachusetts Project would be Deemed Reasonable.

1. Under the riparian law in force both in Massachusetts and in Connecticut a riparian owner is entitled to make a reasonable use of the waters flowing past his land, having due regard for the interests of upper and lower riparian owners upon the same stream.

The general common-law rule as to the rights of riparian owners, as in force in Massachusetts, has been stated as follows:

> "The right of each riparian owner is to have the natural flow of the stream come to his land and to

make a reasonable and just use of it as it flows through his land, subject, however, to the like right of each upper proprietor to make a reasonable and just use of the water on its course through his land and subject further to the obligation to lower proprietors to permit the water to pass away from his estate unaffected except by such consequences as follow from reasonable and just use by him."

Stratton v. *Mount Hermon Boys' School*, 216 Mass. 83, 85 (see cases cited).

See *Taft* v. *Bridgeton Worsted Co.*, 237 Mass. 385, 388.

Collins Mfg. Co. v. *Wickwire Co.*, 14 Fed. (2d) 871, 872.

Parker v. *American Woolen Co.*, 195 Mass. 591, 598-599.

Mason v. *Whitney*, 193 Mass. 152, 158.

McNamara v. *Taft*, 196 Mass. 597, 599.

Isbell v. *Greylock Mills*, 231 Mass. 233, 236.

Parker v. *Griswold*, 17 Conn. 288, 299.

Stamford Extract Mfg. Co. v. *Stamford Rolling Mills Co*., 101 Conn. 310, 320.

Buddington v. *Bradley*, 10 Conn. 212.

What constitutes a reasonable use is purely a question of fact, involving an application of the legal principle above stated to the situation presented before the court.

Elliot v. *Fitchburg R.R.*, 10 Cush. 191, 195.

Mason v. *Whitney*, *supra*.

Parker v. *American Woolen Co.*, *supra*.

McNamara v. *Taft*, *supra*, at p. 599.

Roach v. *Sturdy*, 250 Mass. 357, 358-359.

Hazard Powder Co. v. *Somersville Mfg. Co.*, 78 Conn. 171.

Keeney & Wood Mfg. Co. v. *Union Mfg. Co.*, 39 Conn. 576 (criteria as to reasonable use of water by a mill).

Water Commrs. v. *Perry*, 69 Conn. 461, esp. 467.

Donnelly Brick Co. v. *New Britain*, 106 Conn. 167; 137 Atl. 745.

Gillett v. *Johnson*, 30 Conn. 180.

Parker v. *Hotchkiss*, 25 Conn. 321, 330.

It is undisputed, both in Connecticut and Massachusetts, that diversion of water of a stream for use upon riparian property within the same watershed is entirely proper if it constitutes as a matter of fact a reasonable use of the waters of the stream by the riparian owner.

Stratton v. *Mount Hermon Boys' School*, *supra*.

Hittinger Fruit Co. v. *Cambridge*, 218 Mass. 220 (percolating waters).

Isbell v. *Greylock Mills*, 231 Mass. 233 (where relief was denied).

Keeney & Wood Mfg. Co. v. *Union Mfg. Co.*, 39 Conn. 576, 582 (where diversion and mill use are compared).

Gillett v. *Johnson*, 30 Conn. 180, 183 (diversion of a small stream for purposes of irrigation).

Parker v. *Griswold*, 17 Conn. 288, 297 *et seq.*

See *Wier* v. *Covell*, 29 Conn. 197 (where the decision is based in part upon conveyances there involved).

As to a diversion outside the watershed, the Massachusetts cases are clearly to the effect that use of water outside the watershed is proper if in fact the use in the particular

case constitutes a reasonable use of the waters of the stream in such a way as to cause no material damage to the interests of lower riparian owners. Unless there is actual or perceptible damage to a lower riparian owner, not even nominal damages will be awarded upon his bringing an action of tort based upon the diversion.

Elliot v. *Fitchburg R.R.*, 10 Cush. 191.
Stratton v. *Mount Hermon Boys' School*, 216 Mass. 83, 85.

Upon the same principle, specific relief in equity will be denied to a complainant who cannot show that the diversion which he seeks to enjoin has caused actual damage to his right to make a reasonable use of a stream.

Isbell v. *Greylock Mills*, 231 Mass. 233, 236.

In most of the decided Connecticut cases the diversion complained of was in any event an unreasonable use of the water under the particular circumstances involved, so the question discussed in Massachusetts in the case of *Elliot* v. *Fitchburg R.R.*, 10 Cush. 191, has not been squarely ruled upon in Connecticut. The majority of the riparian cases in the two States deal with diversions from very small streams where any interference with the flow of the stream would be directly and immediately felt by lower riparian proprietors. None of the decided cases involved a situation of fact where the diversion, though taking many gallons of water, removed from the watershed only a very small percentage of the stream flow at the point where it reached the land of the complainant lower riparian owner. The courts deciding the riparian precedents in the two jurisdictions did not have before them a situation involving large riparian owners and diversions of considerable quantity in themselves but of small proportions to the nor-

mal stream flow. This fact, among others, makes the riparian precedents hardly applicable to the case at bar—where the two riparian owners involved are two *quasi*-sovereign States; where the flow of water in the interstate stream is on the average 17,000 cubic feet per second at the point where it reaches the complainant State (see Amended Answer, Appendix "C," p. 27; Reprint of Answer, p. 97); where the diversion takes place some fifty or more miles upstream on a small tributary and involves on the average between 100 and 300 cubic feet per second in wet seasons chiefly on one river (the Swift river, see Reprint of Answer, p. 97) plus the flood flows only of another stream (the Ware river, see Reprint of Answer, pp. 84-86). The vast difference in scale of the case at bar and of the average case hitherto decided between small riparian owners in the two States must be kept in mind, if the local riparian cases are to be in any sense of use by way of analogy.

The Connecticut rule as to diversions probably differs from the rule established in Massachusetts by the *Stratton* case in one particular. A lower riparian owner seems to be entitled to nominal damages even if the infringement of his riparian interests by a diversion to another watershed is of the most trivial sort possible. However, the courts of Connecticut apparently will not award substantial damages for such a diversion, nor will they enjoin such a diversion unless the complainant has suffered substantial damage because of the diversion. Apparently due weight is given to considerations of comparative damage and to facts constituting a basis for giving substitutional relief by way of damages rather than specific relief in the form of an injunction.

Watson v. *New Milford Water Co.*, 71 Conn. 442, 450.

Cf. Harding v. *Stamford Water Co.*, 41 Conn. 87, 95.

Balf Co. v. *Hartford Electric Light Co.*, 106 Conn. 315.

In the *Watson* case an injunction was denied upon the condition that compensation be paid to the complainants for the damage caused by the diversion.

In substance, we submit, the rule in Connecticut is fully as liberal with respect to reasonable but permanent diversions from the watershed as that laid down in the *Stratton* case for Massachusetts. That Connecticut permits the diversion of water from the watershed for use as a domestic water supply under state or municipal control is apparent from the cases cited. Due compensation for *actual damage* caused by the diversion must, of course, be paid.

See also *Beckerle* v. *Danbury*, 80 Conn. 124, 127.

It would seem that the Connecticut courts in a proper case would give due consideration to the amelioration of damage by compensation in kind by augmenting the flow of the diverted stream in dry seasons.

Harding v. *Stamford Water Co.*, 41 Conn. 87, 93.

The rule of reasonable user in the light of the circumstances in each particular case also extends to analogous matters, such as pollution. Each state permits a riparian owner to appropriate a reasonable amount of the capacity of a stream for dilution of sewage and waste.

Parker v. *American Woolen Co.*, 195 Mass. 591.

McNamara v. *Taft*, 196 Mass. 597.

Collins Mfg. Co. v. *Wickwire Co.*, 14 Fed. (2d) 871.
Merrifield v. *Lombard*, 13 Allen 16.
Harris v. *Mackintosh*, 133 Mass. 228.
Martin v. *Gleason*, 139 Mass. 183.
Nolan v. *New Britain*, 69 Conn. 668.
Platt Bros. & Co. v. *Waterbury*, 72 Conn. 531.
Lawton v. *Herrick*, 83 Conn. 417, 425.
Morgan v. *Danbury*, 67 Conn. 484.
See *Donnelly Brick Co.* v. *New Britain*, 106 Conn. 167, and cases cited.
See also *Rockport* v. *Elwell*, 219 Mass. 287.
Ingraham v. *Dunnell*, 5 Met. 118 (where apparently damages were held to be adequate).
Brookline v. *Mackintosh*, 133 Mass. 215.
Stamford Extract Mfg. Co. v. *Stamford Rolling Mills Co.*, 101 Conn. 310.
Rockville, etc., Co. v. *Koelsch*, 90 Conn. 171.
Cf. DeWitt v. *Bissell*, 77 Conn. 530.

So far as the local law of Connecticut and of Massachusetts is here of importance, we submit that it lays down a principle of reasonable user as between riparian owners—a principle of equality of right and opportunity limited only by the obligation not to inflict serious and substantial injury on others equally entitled. It further appears that both States lay some emphasis on the doctrine that specific relief can only be grounded on serious injury to the complainant by the diversion, and even if serious injury appears, serious consideration will be given by the courts to equitable considerations of expediency and comparative damage.

If this were a matter to be settled by an application of the most strict riparian rule (which, we contend, it is not), and regarding both States engaged in the present contro-

versy as riparian owners on a large scale, we submit that there are issues of fact adequately raised by the pleadings (particularly the allegations of the answer) as to the reasonableness of the Massachusetts project and as to the trivial nature of the alleged injury (if any) to Connecticut. The existence of these issues of fact would foreclose any present disposition of this case upon motions in the nature of demurrers to the answer. The allegations of reasonableness in the Massachusetts answer must, for the purpose of these motions, be taken to be true. Under the local law of both States, we submit that, if it be taken as true that the Massachusetts diversion will be in fact reasonable and that Connecticut will not be appreciably injured by it, not only would Connecticut be barred from specific relief by way of injunction but she would also be barred from more than nominal damages. It is obvious also, if the contemplated use of water by Massachusetts—

1. is in fact reasonable
2. in fact causes no appreciable damage to Connecticut—

that Massachusetts under the local law of water rights is taking no property of Connecticut or of its citizens. Thus even upon this factual hypothesis no question of the exercise of the right of eminent domain by one State over land in another State is here presented.

As we have argued above, however, this case must be decided on a broader basis than the municipal law of the two States concerned—a basis depending largely upon the facts actually found to be true. Until those facts are found, the pending motions should be denied.

2. Connecticut habitually permits diversions of streams for the purpose of supplying municipalities with water for domestic use. Connecticut in equity cannot complain if

Massachusetts makes reasonable use of interstate waters arising within her borders for similar purposes, even if a diversion be necessary; provided Massachusetts does not permanently abstract more than the share of such interstate waters to which she is entitled under the doctrine of equal division of benefit.

It is apparent from the decisions of this Honorable Court in interstate controversies (see *supra*, pp. 43-53) that the conduct of a complainant State in matters similar to those arising in the pending cause will be regarded as of some importance by the Court as establishing a standard by which to judge whether or not the conduct of the defendant State is equitable. In cases involving interstate waters the practice of the complainant State with respect to such waters or other similar waters affords some basis for determining whether or not the defendant State, in doing the acts complained of, is exceeding its fair share of the beneficial use of the interstate waters under the applicable doctrine of equitable division. The municipal practice in the States, parties to the controversy, influences the determination of the basis of making an equal division of benefit. In the case at bar, therefore, if it should appear that Connecticut habitually permitted diversion of streams for the purpose of water supplies, or that Connecticut recognized the priority of a claim to use water for domestic purposes over a claim to use water for power or for sanitation, it would warrant this Court in coming to the conclusion that the doctrine of equitable division should be applied so as to permit Massachusetts to make similar diversions for similar purposes, provided that the action of Massachusetts did not have any seriously detrimental effect upon the ability of Connecticut to make a like diversion for domestic purposes.

Connecticut for some years has by general statute permitted municipalities and public service water companies

to make diversions for water supply purposes. Section 2542 of the General Statutes of Connecticut (1918 revision) reads as follows:

> "*Power to take lands and streams.* Any town, city, borough or corporation authorized by law to supply the inhabitants of any town, city or borough with pure water for public or domestic use may take and use such lands, springs, streams or ponds, or such rights or interests therein, as the superior court, or any judge thereof in vacation, may, on application, deem necessary for the purposes of such supply. For the purpose of preserving the purity of such water and preventing any contamination thereof, such town, city, borough or corporation may take such lands or rights as the superior court, or any judge thereof in vacation, may, on application, deem necessary therefor. Compensation shall be made to all persons entitled thereto in the manner provided by section 2543."

Chapter 131 of the General Statutes contains comprehensive provisions for the safeguarding of water supplies, and shows the importance attached by Connecticut to a pure supply of suitable and fresh water for its cities and towns.

Section 5181 gives a broad permission to state departments to take water for use in state institutions:

> "*Condemnation of land and water for state institutions.* The state may take any land which the trustees or directors of any state institution may deem necessary for any addition to the site of such institution, and also may take water from any river, brook, spring or springs, pond or lake for the purpose of providing such supply of water as the convenience and necessity of such institution may require."

By special act many municipalities and public water companies in Connecticut are authorized to make particular diversions for municipal water supplies; in some cases the grant of power to make diversions being couched in general terms and apparently applying to all water flowing through or lying within Connecticut; in other cases, limited to the waters within stated geographical limits. An exhaustive list of the many special acts incorporating water companies or authorizing general or particular diversions would serve no useful purpose here. A few instances representative of a very large body of such legislation will suffice.

Ansonia Water Company, Incorporated, Conn. Act of July 9, 1884, Priv. Laws, Conn., vol. 5, p. 665, section 9, provides, in part:

> "The said company shall have full power . . . to construct . . . such reservoir or reservoirs as they may deem expedient or necessary; to take and use the water of any spring or springs, stream or streams, or other waters to such extent and in such manner as may be necessary or expedient . . . to the most perfect and complete supply of the borough of Ansonia with pure water for all public and private uses. . . ."

The charter was amended in 1909 (Spec. Laws, Conn., vol. 15, p. 971) to permit supplying the village of Ansonia "with an abundant supply of pure water for public, domestic, and general use."

Similar provisions are to be found in the Special Laws, as follows,—

Vol. 5, p. 244 (1859), Birmingham;
Vol. 11, p. 38 (1893), Bradford Water Company;
Vol. 4, p. 1356 (1856), Bridgeport Water Company;

Vol. 9, p. 910 (1884), Bristol Water Company—restricted by amendment to geographical limits, vol. 16, p. 240 (1911), but extended somewhat, Spec. Acts, Conn. (1919), c. 164;

Vol. 5, p. 673 (1864), Centreville Water Company;

Vol. 15, p. 584 (1907), Cornwall Water Company;

Vol. 5, p. 333 (1860), Danbury;

Vol. 12, p. 91 (1895), Farmington Water Company;

Vol. 14, p. 323 (1903), Glenville Power and Water Company—

for the development of reservoirs on the Byram river, an interstate stream. Amended Spec. Acts, Conn. (1927), c. 340, to permit supplying certain towns in Westchester County, State of New York, as well as Connecticut towns. A similar provision with respect to the Greenwich Water Company is found in Spec. Acts, Conn., 1925, c. 340.

Spec. Acts, Conn., 1925, c. 295, gave broad new powers to the New Haven Water Company with respect to a diversion of the waters of the Hammonassett river. Similarly, a considerable diversion by the Connecticut Light and Power Company for power purposes was authorized with respect to the Rocky river and the Housatonic river by Spec. Acts, Conn., 1919, c. 129.

A diversion was authorized from the Connecticut river itself to supply Hartford. Priv. Laws, Conn., vol. 4, pp. 1364, 1366 (1851). This supply has since been augmented by other diversions from interstate tributaries of the Connecticut river. Conn. Spec. Laws, vol. 16, part 1, pp. 389-395.

These statutory citations are sufficient, we submit, to show that in Connecticut there is a well-established policy

of permitting diversions for the purpose of water supplies. The decisions of the courts sustain this policy to the utmost, and, though compensation must be paid for any damage to property actually sustained by individuals, it is a question in each case of condemnation what that damage, if any, really is. If there were no substantial damage to a lower riparian owner, only nominal damages would be given.

The extent to which the Connecticut policy goes is shown by the case of *East Hartford Fire District* v. *Glastonbury Power Co.*, 92 Conn. 217. In that case the Connecticut court upheld a taking for municipal water supply purposes of water privileges held by the defendant company for future use for public utility purposes. In effect the Connecticut court announced that the Legislature had intended to establish a priority of privilege in favor of municipal water supplies, superior even to use of water for other public or *quasi*-public purposes. At pp. 222-223 the Court said:

> "As to the proposition that the development and maintenance of water-power is in itself a public use within the meaning of the rule relied on by the respondent, it should be noted that it has long been the custom of the General Assembly to grant to public and private corporations, chartered for the purposes of municipal water-supply, general authority to take water from any source within specified limits. In *Water Commissioners* v. *Johnson*, 86 Conn. 151, 164, 84 Atl. 727, the validity of these general grants was affirmed, with the remark that if they were not valid 'much, if not most, of our legislation empowering municipalities to provide water-supplies would fail.' It is also notorious that practically all of our streams available for municipal water-supply were long ago utilized for water-power, either directly or through

their connecting waters. It must therefore be supposed that the General Assembly, in making these general grants, intended them to be operative upon streams already used for water-power. Such has been the common understanding of their effect, and, it must be held, that, by necessary implication, these grants of general power to take water from any brook within specified territory authorize the taking of water from existing water-powers, at least when such water-powers are not already employed in some other public use at the time of the proposed taking."

Nor is the Connecticut policy supporting privileged use for municipal water supplies confined to any meagre construction of present necessities. The cities and towns of the State and the public service water companies that supply them are entitled to make due preparations for future necessities.

In *New Haven Water Co.* v. *Russell*, 86 Conn. 361, the power and obligation of a public service water company to anticipate future water requirements of a great city was stated by *Wheeler*, J., as follows:

"The trial court, against the objection of the respondents that the evidence was irrelevant and did not tend to prove the necessity, permitted the applicant to offer evidence that it had, since 1876, been preparing, by plans and purchases, to take the waters of these streams, and had recently constructed a tunnel, having a capacity of thirty million gallons a day, at an expense of over $300,000 for the purpose of diverting the waters of these streams into its system of water-supply.

"The evidence was admissible to put the judge in possession of all the facts connected with the proposed water-supply, and to show the good faith of the ap-

plicant. It was so held in a similar proceeding. . . . It was also admissible, as claimed, as tending to prove the necessity. No claim was made that the applicant had not expended these funds and made and executed these plans in carrying on its corporate business. That a private corporation has for over thirty years steadily pursued a definite plan looking to the ultimate acquisition of a source of water-supply, and to that end, through a period of years, has made land and mill-site purchases, and finally built, at great expense, a tunnel with a daily capacity in excess of the present daily consumption of the company, proves its own fixed belief that this source of water-supply is necessary; and we think such a course of conduct is a relevant fact in the proof of the issue of necessity. . . .

* * * * * * * *

"The respondents further insist that the court erred in overruling its claim that 'the time within which such reasonably definite amount of water is necessary, must be either present or within a reasonably short time in the future'; and they ask to have the finding corrected in certain particulars upon which the conclusion of necessity rests, and insist that the facts found by the judge do not legally support his conclusion of necessity.

* * * * * * * *

". . . A private corporation engaged in furnishing a water-supply to a community owes it the duty of providing an adequate supply of wholesome water at all times. Experience teaches that consumption increases largely in the summer season, and that changeable seasons, long droughts, and the liability of accidents are contingencies which must be guarded against; a supply adequate for the ordinary season or the present

need will not protect against such contingencies. . . . Growth in population and in industrial activity, with consequent increasing use of water, must be anticipated and provided for. . . . Provision for all such likely contingencies must not be scant; it must be ample, so that the health of the people be preserved and their property safeguarded from fire, and all their countless activities—so variously served by an abundant water-supply—be sustained and developed. The supply should be so ample as not only to avoid anxiety lest it fail, but so ample that a scarcity could not be reasonably apprehended. The property taken must be restricted to that which will reasonably serve the public use; more than that would, in effect, be a taking for private use, and illegal because an abuse of power. . . . Nor may private property be taken for speculative purposes, or to secure a monopoly, or forestall a rival; . . . or in bad faith, or indeed for any other than the corporate purpose. . . . Purposes such as these are clearly not among those reasonably necessary.

"It cannot be foretold when the contingencies of which we have spoken may be expected, nor can the future requirements and prospective needs within a reasonable time be estimated with exactitude; it is necessarily a matter of judgment based upon knowledge of the present and experience of the past. The reasonableness of the necessity must be ascertained from the facts of each case; and a reasonable discretion in reaching this conclusion will not be interfered with. . . . The reasonableness of the necessity will be determined with due regard to the principle that a public or private corporation, charged with the duty of supplying a community with water, fails in its duty if it provides for the present needs and takes no heed of future needs or imminent contingencies. The remedy

should precede the untoward happening, and for its accomplishment, prospective needs, within a reasonable time, should be considered."

This language is quoted at length because it embodies a principle which indicates one of the fundamental equities of the case at bar. Connecticut recognizes that water supply projects are expensive and, when undertaken, sound economy dictates that they shall be so planned that not only the immediate needs of a community, but also the needs of a generation hence shall be satisfied by the same project, without further duplication of expense in the future. Sovereigns and their agencies are not to be required to pursue a hand-to-mouth policy. They are to be permitted to anticipate the future so far as the future is predicable, and so far as the needs of future years are uncertain, a State is entitled to make a reasonable guess based upon the criteria and data at hand.

The existence of this doctrine and of its practical application in Connecticut is one of the elements which this Court may properly consider in determining the law applicable to the case at bar. Upon the pleadings, the Massachusetts allegations that Connecticut will be caused no substantial damage by the Metropolitan District Water Supply project must be taken as true. Upon such an actual state of fact, if found by the trier of the fact in an *intra*-state condemnation suit, the lower riparian owner would be entitled to no damages, or at most to purely nominal damages. Under the most strict and rigid construction of the common law of riparian rights a lower riparian owner would in such circumstances have no basis of action against an upper riparian owner causing no damage by a diversion. Certainly he could obtain no specific relief in equity. Even if some slight damage were caused to Connecticut by the proposed diversions (which, under the present state of the pleadings in this case, does not appear), the practice of

Connecticut with respect to municipal water supplies would lead this Court in applying the doctrine of equitable division of the benefit of interstate waters to consider whether equity did not require that Connecticut be remitted to substitutional relief by way of damages at law and individual inhabitants to relief based upon the terms of the Massachusetts statutes (see original Answer, Appendix "A," pp. 38-40, 52-54, 59; Mass. St. 1926, c. 375, § 1; Mass. St. 1927, c. 321, §§ 4, 7). See *Manville Co.* v. *Worcester*, 138 Mass. 89; *Brickett* v. *Haverhill Aqueduct Co.*, 142 Mass. 394, 396; *Andrus* v. *Berkshire Power Co.*, 145 Fed. 47; 147 Fed. 76; cert. den. 203 U.S. 596. See also an interesting opinion in which the Attorney General of Massachusetts declined to take action against Connecticut at the request of Massachusetts landowners injured to some extent by the flowage of their land by a power project carried out in Massachusetts. In vigorous language the then Attorney General states that it is not his duty to represent the Commonwealth in interstate controversies except where in some way the general welfare of the community has been seriously affected by the action of another sovereign. The existence of a right to sue for compensation in Connecticut even for damage to Massachusetts land was regarded as affording a reasonable remedy to citizens of Massachusetts affected by the act of the Connecticut company. See Memorandum, Mass. Op. Atty. Gen., vol. III (1908), p. 596. The existence of a remedy at law for individual inhabitants of Connecticut or persons owning lands in Connecticut is an element which this Court should consider (if it should eventually appear that Connecticut is damaged) under the doctrine of equitable division, particularly in view of the fact that the statutes of Connecticut have established a policy of forced taking of waters for municipal water supplies. The situation, in the event that the Special Master appointed in this cause found that lands in Connecticut were to some degree damaged, would then,

as part of the doctrine of equitable division, call for the application of the equitable principle of comparative damage, laid down in *Kansas* v. *Colorado*, 206 U.S. 46, 100, 113-114 (see *supra*, pp. 45-48). Conceivably denial of equitable relief could be made conditional upon continued furnishing of the compensatory flow ordered by the War Department (see Appendices "B" and "C," Amended Answer, pp. 12-32; Reprint of Answer, pp. 81-102, esp. 99-100). Upon the technical admissions of the pending Connecticut motions, it must be taken as a fact that the Massachusetts diversion is to be reasonable and that no substantial damage to Connecticut will take place (see Original Answer, par. 16, esp. p. 15; par. 17, esp. p. 20; Reprint of Answer, pp. 17-18, 23). The question of compensation, therefore, does not arise upon these motions.

III.

UPON THE ISSUES RAISED BY THE ANSWER, MASSACHUSETTS ALLEGES FACTS WHICH, IF PROVED, CONSTITUTE A FULL AND ADEQUATE DEFENSE TO THE BILL OF COMPLAINT. THE MOTIONS TO DISMISS AND TO STRIKE OUT THE ANSWER SHOULD BE DENIED AND THE CASE SHOULD BE COMMITTED TO THE SPECIAL MASTER.

A. Under the Law Applied by this Honorable Court in Litigation as between States of the Union, Connecticut will Not be Entitled to Relief in Equity unless she Shows Great, Unusual, and Substantial Damage to her Sovereign Rights. Equitable Principles of Comparative Damage are Applicable to this Case.

It is well settled that this Court, in exercising its original jurisdiction between States, requires that the complainant State prove that the injury which is the basis of its proceeding is a real and substantial injury causing serious damage to the complainant. It is generally stated that in

order to obtain equitable relief in a suit between two States of the Union far greater damage to the interests of the complainant State must be shown than must be proved by the complainant in the case of a controversy between two private individuals.

Missouri v. *Illinois*, 200 U.S. 496, 521.
New York v. *New Jersey*, 256 U.S. 296, 309.
North Dakota v. *Minnesota*, 263 U.S. 365, 374.

The doctrine of the cases just cited is supplemented by the doctrine that a State will not be entitled to relief in a case brought under the original jurisdiction of this Court unless it can show that a present and substantial interest is affected by the injury complained of.

New York v. *Illinois*, 274 U.S. 488, esp. at p. 490.
New Jersey v. *Sargent*, 269 U.S. 328.
Cf. Pennsylvania v. *West Virginia*, 262 U.S. 553, 593.

It is also true that this Court will not grant equitable relief to one State against another where the complainant State is suing purely on behalf of its individual inhabitants. The interest sought to be protected by the complainant State must, of course, be an interest so general in its scope that its protection is a duty of the complainant State as *parens patriae*.

See *North Dakota* v. *Minnesota*, 263 U.S. 365, at p. 375 *et seq.*

In a case very similar to the cases which ordinarily come to this Court in the exercise of its original jurisdiction between States, this Court gave great weight to facts which gave a basis for equitable defenses—in the particular case

that of laches—as a reason for granting substitutional rather than specific relief.

New York City v. *Pine*, 185 U.S. 93.

The cases of interstate water controversies examined at length *supra* (pp. 43-54) show that this Court gives attention to a comparison of the damage to a complainant State which would be caused by denying an injunction and that which would be caused to a defendant State by allowing an injunction.

See, especially, *Kansas* v. *Colorado*, 206 U.S. 46, 100 *et seq.* (see *supra*, pp. 45-48).

We contend that allegations of fact in the answer which set up a basis for the denial of specific relief upon equitable principles are fully as pertinent as those allegations which categorically deny Connecticut's right to any relief.

B. As a Matter of Law the Facts Alleged in the Answer, if Taken to be True, Constitute a Full Defense to the Bill, and Specific Equitable Relief should be Denied.

In the statement of facts (*supra*, pp. 1-4) we have outlined—

(1) the facts affirmatively alleged in the bill and admitted by the answer.

(2) the facts affirmatively pleaded in the answer, the truth of which is admitted for the purposes of the pending motions by Connecticut.

We contend that the facts thus set up are sufficient in law to be a complete answer to the allegations of the bill or to raise issues of fact which according to the custom of this Court should be decided by the Special Master. The two motions must be examined in detail.

The Motion to Dismiss.

1. Paragraph 1 (Mot. to Dismiss, p. 5) raises the question of the general inadequacy of the answer. We submit that the denials and allegations of the answer show sufficient facts—

(*a*) to raise issues of fact as to the existence of any damage to Connecticut.

(*b*) to furnish a basis for the denial of specific relief in equity.

(*c*) to show that Massachusetts does not propose to divert more than her equitable share of waters arising within her borders and forming a part of the Connecticut river watershed.

2. Paragraph 2 of the motion is obviously rendered unimportant by the amendments of the answer (allowed December 2, 1929) setting up the action of the War Department.

3, 4, 5, 6, 7, 8, and 9. These paragraphs (Mot. to Dismiss, pp. 6-8) deal with the Federal issue of navigation. The answer makes allegations of fact—

(*a*) that the diversions proposed will not diminish appreciably (or in such a way as to be capable of measurement at the state line—see, *e.g.*, Answer, par. 17, p. 19; Reprint of Answer, p. 22) the amount of water flowing in the Connecticut river in its navigable portion.

(*b*) that no structures are to be erected in navigable waters.

(*c*) that the Secretary of War has found as a fact that, if the diversion is kept within the limits specified, it will have no adverse effect on navigation.

These facts (taken to be true for the purpose of these motions), under the principles of law fully discussed (*supra*, pp. 14-35), are adequate as a defense to the bill so far as the issue of navigability is concerned.

10, 11, 12, and 13. These paragraphs of the motion to dismiss (pp. 8-9) rest upon the contentions—

(*a*) that the Massachusetts project involves substantial damage to Connecticut—which Massachusetts denies emphatically.

(*b*) that the Massachusetts project involves a permanent appropriation of more water than Massachusetts is entitled to under the principle of equitable division as between sovereign States of the beneficial use to be derived from the waters of interstate streams.

(*c*) that the Massachusetts project involves an unreasonable use of water.

Connecticut upon these motions must be taken to have admitted the truth of the allegations of fact in the answer as to the comparative unimportance of the Massachusetts diversion as measured by its effect upon the flow of the Connecticut river at the boundary of the two contestant States. Upon this admission of fact, we submit that as a matter of law—

(*a*) it cannot be said that there is any taking of property in Connecticut by Massachusetts requiring the exercise of eminent domain.

(*b*) it cannot be said that Connecticut has shown sufficient damage to entitle her to relief in equity as of absolute right before this Honorable Court.

(*c*) it cannot be said that the Massachusetts project is unreasonable under either the principle of equitable division of benefit or the most strict riparian doctrine.

14 and 15. These paragraphs proceed upon the theory that the rule of law applicable to the case at bar is the most strict common-law doctrine of riparian rights to be found in the books. We submit that the municipal law of the two States has been radically liberalized by decision, statute, and commercial and municipal practice (see *supra*, pp. 68-79). We contend further that municipal law of the

two States is not here applicable, but rather that the *quasi*-international principle of equitable division as between sovereign States is controlling. Under any view of the law of the case, the allegations of fact in the answer showing that the Massachusetts project is a *de minimis* matter are a sufficient basis for denying Connecticut relief upon these motions.

16. Connecticut in paragraph 16 (Mot. to Dismiss, pp. 10-11) denies the pertinency and adequacy of all allegations of Massachusetts which form a basis for the denial of specific relief for equitable reasons. That this Court will give consideration to all the equities of the situation before it in an interstate controversy is settled beyond a doubt (see *supra*, pp. 79-81).

The Motion to Strike Out.

1. This paragraph (Mot. to Strike Out, pp. 5-6) seeks to strike out allegations of the answer denying damage to Connecticut. Obviously, upon the principle of equitable division (and even upon the most rigid common law principles of riparian law), the existence of substantial damage is a condition precedent to relief.

2. This paragraph (Mot. to Strike Out, pp. 6-8) seeks to eliminate from the answer all allegations of possible benefit to Connecticut from the partial diversion of the flood waters of the Swift river and the Ware river and from the release of stored flood waters in seasons of drought. These allegations of the answer are material—

(*a*) as a possible basis of the War Department findings in the interest of navigation (see *supra*, p. 32).

(*b*) as a basis for the application of equitable principles of comparative damage and conditional denial of relief.

(*c*) as showing that Connecticut is not damaged and is, therefore, entitled to no relief.

3. This paragraph of the motion to strike out (pp. 8-12) seeks to have removed all allegations in the answer as to the necessities of the Massachusetts action. These allegations are material as—

(*a*) furnishing ground for the application of equitable principles of comparative damage.

(*b*) providing a basis for a recognition of the *quasi*-international doctrine of the priority of claim of municipal water supplies upon the waters of international and interstate streams, as an integral part of the recognized doctrine of equitable division.

(*c*) showing the purpose of the Massachusetts diversion, so that it may be judged in the light of similar diversions made by Connecticut.

These allegations of the answer must be viewed in connection with the allegations showing that the proposed diversion is in fact *de minimis* and setting up the reasonableness and equitable nature of the Massachusetts project.

4. Paragraph 4 (pp. 12-14) of the motion seeks to strike out all references in the answer to the defense based on the alleged laches of Connecticut. Upon these motions Massachusetts does not contend that Connecticut's delay in acting is sufficient to bar that State from all relief before this Court. We do contend that Connecticut's conduct in fact does furnish some basis for the denial of specific relief—and we submit that the allegations should be permitted to remain a part of the answer, until after a report from the Special Master is received by this Honorable Court.

5. This paragraph (Mot. to Strike Out, p. 14) seeks to strike out all allegations with respect to the expense incurred by Massachusetts. Under the law of Connecticut the expense of such a project as this may be relied upon as showing good faith (*supra*, p. 74). It certainly is an element which might well influence this Court in applying

equitable principles of comparative damage and conditional denial of specific relief.

6. Connecticut by paragraph 6 (Mot. to Strike Out, pp. 14-17) asserts that the allegations in the answer of the existence of an adequate remedy at law are immaterial. The facts set up in the portions of the answer sought here to be eliminated certainly are appropriate for consideration of this Court in the determination of the issue of whether or not specific relief by way of injunction should be granted to Connecticut. The facts (admitted by these motions) that the Massachusetts diversion is *de minimis* and that no substantial damage is caused to Connecticut or to any property in Connecticut make these allegations of the answer exceedingly pertinent.

7, 9, and 11. These paragraphs (pp. 17-20, 24-26, 29-30) of the motion seek to strike out all allegations of the answer denying injury to the health, welfare, safety, and other interests of the citizens of Connecticut, all allegations setting up the *de minimis* nature of the diversion, and all allegations affirming the reasonableness of the Massachusetts project. These allegations raise the essential issues of the case:

(*a*) If Connecticut is not damaged, she is not entitled to relief.

(*b*) If the fundamental welfare of the Connecticut community is not seriously harmed, Connecticut can have no relief as against a sister *quasi*-sovereign State.

(*c*) If the Massachusetts project leaves the Connecticut river to all intents and purposes the same river as to volume of flow and quality of water when it enters Connecticut, Connecticut certainly has no claim for relief under either the principle of equitable division of benefit or under any principle of the municipal law of riparian rights. These allegations of the answer are entirely essential, material, and proper.

8. Paragraph 8 (Mot. to Strike Out, pp. 20-24) seeks to strike out certain allegations of the answer dealing with the question of navigability. Some of the contents of this paragraph of the motion are rendered obsolete by the amendments to the answer (allowed December 2, 1929). The others are effectually answered by the arguments upon the motion to dismiss (*supra*, p. 84).

10. This paragraph (pp. 27-28) of the motion seeks to strike out one portion of the Massachusetts answer, setting up the general nature of the project and three portions of the answer alleging that by the municipal law and actual commercial and municipal practice of the two States here involved reasonable diversions of water causing no substantial damage to other riparian owners are proper, particularly when made for water supply purposes. It is obvious that the general statement of the project (Answer, par. 14, pp. 12-13; Reprint of Answer, p. 15) is pertinent and proper as showing the precise nature of the acts complained of by Connecticut. The allegations as to the law of Connecticut and Massachusetts and the practice with respect to the use of waters in those States are pertinent in view of the fact that this Court gives some weight to these matters in determining the principles upon which it will make an equitable division of interstate waters (see *supra*, pp. 43-54).

12. Paragraph 12 (Mot. to Strike Out, p. 30) seeks to eliminate a denial by Massachusetts of Connecticut's claim to an absolutely undiminished flow in the Connecticut river. The Connecticut contention to this effect blandly overlooks the principle of equitable division so frequently announced by this Court and ignores the fact admitted by the motion that the Massachusetts diversion is negligible and thus involves no taking of property in Connecticut under any theory of law.

C. As a Matter of Discretion, this Honorable Court should Deny the Motions of Connecticut and should Commit this Case to the Special Master for Findings of Fact.

We have argued above (*supra*, pp. 81-87) that the facts alleged or admitted in the defendant's answer are sufficient as a matter of law to constitute a defense to the Connecticut bill. We submit that we have shown (*supra*, pp. 35-54) how much this Court has been accustomed to rest its determination of the principles of law applicable to an interstate water dispute upon the facts revealed by the particular case. The facts not only are the basis for the application of established legal principles by this Court, but to some extent the facts determine the legal principles to be applied and enter into the creation of new rules of law developed for the determination of the pending case alone. It is apparent, therefore, that the definite ascertainment of the facts pertinent to the pending controversy is a necessary condition precedent to the determination of the principles of law by which the case is to be decided. Obviously, motions are premature which seek to have allegations of fact in the answer (necessarily general because of the magnitude of the project involved) stricken out and dismissed as inadequate to constitute a defense in law or in equity, when those facts are established as admitted solely in a very technical sense for the purposes of the motions.

It is, of course, necessary that the allegations of the answer as to the reasonableness of the contemplated diversions be couched in general terms. Before these allegations really can mean anything to this Court, sitting as a *quasi*-international tribunal, they must be expanded, explained, analyzed, and tested by some competent trier of the fact who can examine the whole project in the light of the background of local custom and economic practice and as affected by local law and public necessity. Attached hereto (opposite this page) are four photographs to serve as a



A. WARE RIVER BELOW POINT OF DIVERSION.



B. SWIFT RIVER 1 MILE BELOW POINT OF DIVERSION.

Note: Of course no diversion has in fact taken place as yet. The project will not take effect at all until 1931 (Answer, par. 19, p. 23; Reprint of Answer, p. 26).



C. The Connecticut river from slightly below the Massachusetts–Connecticut State line.



D. The Connecticut river looking upstream from the Massachusetts–Connecticut State line.

graphic illustration of our argument that as a matter of policy this Court should have all the facts before it before determining any questions of law going to the root of the whole controversy. The two pictures marked "A" and "B" on page A show the Ware river and the Swift river, respectively, at or near the point of diversion. The two pictures marked "C" and "D" on page B show the Connecticut river at or near the point where the river crosses the boundary between Connecticut and Massachusetts. An examination of these pictures immediately brings to mind a large number of questions of fact that this Court would insist on having answered before determining this important cause. How much of the flow shown in the Ware and in the Swift rivers will be taken under the Massachusetts plans? Is this a fairly representative wet or dry season flow? What is the usage of the community through which these streams flow as to diversions? storage? regulation of flow? disposal of liquid industrial waste? What proportion of the flow shown in the Connecticut river comes from the flow shown in the Ware and Swift rivers? What relation does experience show exists between the flow of the Connecticut river, both at Hartford and at the state boundary, and the flow of the Swift river and the Ware river? How does the change of tide and wind affect that relation? Would any diversion in fact be permitted under the terms of the War Department findings when a condition of stream flow existed as shown in these pictures? All these questions and many more must be answered before the issue of the reasonableness of the Massachusetts project can properly be determined. We do not offer these photographs as having any evidential value. They are submitted purely as a chalk to emphasize our argument that this case involves primarily questions of fact. After those questions have been decided, issues of law will arise. Before those questions are decided, any attempt to dispose of issues of law or of issues of mixed fact and law is premature.

We submit that in the exercise of a sound judicial discretion the Connecticut motions should be denied and the cause committed to the Special Master.

Respectfully submitted,
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APPENDIX "A"

A Memorandum Discussing Precedents as to the Use of International or Interstate Streams or Lakes.

This memorandum is designed to supplement the discussion of international law precedents applicable to the case at bar to be found in the body of the brief (see *supra*, pp. 54-61).

The Summary Prepared by the Institute of International Law.

The subject of the international regulation of international waters with respect to their exploitation for water power and their exploitation in general was elaborately studied by the Institute of International Law in 1911. The Sixth Commission of the Institute, with Professor von Bar as *rapporteur*, including as members of the Commission Messrs. Engelhardt, Harburger, Kaufmann, Meurer, Oppenheim, Politis, Rolin, and Vesnitch, made an elaborate report on the subject, based upon an article by Professor von Bar published in the *Revue de Droit International Public*, 1910, p. 281. The report of the Commission is to be found in the *Annuaire* of the Institute for 1911, pp. 156-199. The subject was carefully considered by the Institute at its Madrid session, April 19-20, 1911 (see *Annuaire* for 1911, pp. 347-364). At the conclusion of this consideration, the Institute voted the following resolutions (*Annuaire* for 1911, pp. 365-367, translation from the French as published in *Scott, Resolutions of the Institute*, 1916, pp. 169-170):

> "I. When a stream forms the frontier of two States, neither of these States may, without the consent of the other, and without special and valid legal title, make or allow individuals, corporations, etc., to make alterations therein detrimental to the bank of

the other State. On the other hand, neither State may, on its own territory, utilize or allow the utilization of the water in such a way as seriously to interfere with its utilization by the other State or by individuals, corporations, etc., thereof.

"The foregoing provisions are likewise applicable to a lake lying between the territories of more than two States.

"II. When a stream traverses successively the territories of two or more States:

"1. The point where this stream crosses the frontiers of two States, whether naturally, or since time immemorial, may not be changed by establishments of one of the States without the consent of the other.

"2. All alterations injurious to the water, the emptying therein of injurious matter (from factories, etc.), are forbidden.

"3. No establishment (especially factories utilizing hydraulic power) may take so much water that the constitution, otherwise called the utilizable or essential character of the stream, shall, when it reaches the territory downstream, be seriously modified (*gravement modifié*).

"4. The right of navigation by virtue of a title recognized in international law may not be violated in any way whatever.

"5. A state situated downstream may not erect or allow to be erected within its territory constructions or establishments which would subject the other State to the danger of inundation.

"6. The foregoing rules are applicable likewise to cases where streams flow from a lake situated in one State, through the territory of another State, or the territories of other States.

"7. It is recommended that the interested States appoint permanent joint commissions, which shall

render decisions, or at least shall give their opinion, when from the building of new establishments serious consequences might result in that part of the stream situated in the territory of the other State."

These resolutions of the Institute seemingly embody the principle of equitable division of the benefits of waters, as between sovereign States, which this Court has consistently applied in interstate controversies. The principles here suggested establish no hard and fast rule that diversions are entirely prohibited. On the contrary, standards are set up according to which diversions and other modifications of stream flow may properly take place, and the underlying principle of those standards is that an upper State may use and permanently abstract a reasonable amount of the stream, provided that the change in the stream does not seriously alter the ability of any lower State to make a similar permanent abstraction.

Treaty Recognition of Equitable Division Principle.

The new régime laid down for international rivers in the Treaty of Versailles of June 28, 1919, is designed to protect navigation on the rivers first of all, and article 336 of the Treaty of Versailles recognizes navigation as of paramount interest. But in article 358 of the Treaty of Versailles, France is given, subject to the obligation to comply with the provisions of the Convention of Mannheim or of the Convention which may be substituted therefor, and to the stipulations of the present treaty, on the whole course of the Rhine between the two extreme points of the French frontiers, "the right to take water from the Rhine to feed navigation and irrigation canals (constructed or to be constructed) or for any other purposes, and to execute on the German bank all works necessary for the exercise of this right." She is also given an exclusive right

to power derived from works of regulation on the river. It is provided, however, that the exercise of these rights shall not interfere with navigability nor reduce the facilities for navigation. It is also recognized that the same rights may be enjoyed by Switzerland. By article 351 of the Treaty of Versailles, Czechoslovakia, Yugoslavia, and Roumania are permitted, with the authorization of the International Commission, to undertake works on any part of the river system which forms a frontier. Article 336 provides means of preventing interference with navigation as a consequence of works which may be erected by any State. But in article 337 a clear recognition is to be found of the various purposes for which works on a river may be erected, and the tribunal instituted by the League of Nations for dealing with questions arising out of the erection of works is directed to give priority even over navigation to certain uses which may be made of the water. Thus article 337 provides:

> "The tribunal mentioned in the preceding Article shall be entitled to enforce the suspension or suppression of such works, making due allowance in its decisions for all rights in connection with irrigation, water-power, fisheries, and other national interests, which, with the consent of all the riparian States or of all the States represented on the International Commission, if there is one, shall be given priority over the requirements of navigation.
>
> "Appeal to the tribunal of the League of Nations does not require the suspension of the works."

European Treaties Concerning Use of Streams.

Analogous provisions are to be found in article 298 of the Treaty of St. Germain with Austria. Moreover, special provisions were introduced in the Treaty of St. Germain (articles 309-310) relating to the use of water in

international streams for hydraulic power and for municipal or domestic purposes.

In article 282 of the Treaty of Trianon with Hungary, and article 292, the high contracting parties deal very elaborately with the use of the hydraulic system for canalization, inundation, irrigation, drainage, or similar matters, and by article 293 a special Permanent Technical Hydraulic System Commission is created to study not only questions relating to navigation, but also special questions relating to fishery interests and other hydraulic matters. Analogous provisions are to be found also, in article 226 of the Treaty of Neuilly with Bulgaria, article 234 of which relates to the maintenance and improvement of works on the Danube River for other purposes than navigation.

The Statute on the Régime of Navigable Waters of International Concern annexed to the Convention opened for signature at Barcelona, April 20, 1921 (7 LEAGUE OF NATIONS TREATY SERIES, p. 35), provides (article 10) that each riparian State is bound to refrain from measures that would prejudice navigability, but paragraph 3 of article 10 recognizes other interests of the State which may, in some cases, take precedence even over navigability. These are enumerated as follows: "*inter alia*, the maintenance of normal water conditions requisite for irrigation, the use of water power, or the necessity for constructing other or more advantageous ways of communication." It is also recognized in paragraph 6 of article 10 that a State may have "an economic interest clearly greater than that of navigation."

On December 9, 1923, a convention on the Development of Hydraulic Power Affecting more than One State was opened for signature at Geneva (119 BRITISH AND FOREIGN STATE PAPERS, p. 541). Article 4 of this Convention provides that, "if a contracting state desires to carry out operations for the development of hydraulic power which might cause serious prejudice to any other contracting

state, the states concerned shall enter into negotiations with a view to the conclusion of agreements which will allow such operations to be effected." And by article 6 such agreements are to deal *inter alia* with the regulation of the flow of water.

A Convention instituting a Definitive Statute of the Danube was signed in Paris, July 23, 1921 (BRITISH TREATY SERIES, No. 16, 1922). Under article 14, a riparian State must inform the International Commission of works which it plans to have undertaken in connection with irrigation or the utilization of hydraulic power, but the Commission may not prohibit such construction except in so far as it is detrimental to navigation.

The Statute of Navigation of the Elbe was instituted by a convention signed at Dresden February 22, 1922 (26 LEAGUE OF NATIONS TREATY SERIES, p. 219). By article 39 of this statute a riparian State must furnish the International Commission of the Elbe a description of works which it proposes, including defense works against inundation and "works affecting irrigation and the use of hydraulic energy." The Commission is given power to prohibit works only in so far as they entail construction prejudicial to navigation, and in this connection it must take into consideration "all the interests of the riparian state." Under article 43 a State may have an obligation to cooperate in improvements planned by another State, though it is recognized that this obligation may not exist where its interests such as "the maintenance of the normal regulation of the water, the needs of irrigation, the use of hydraulic energy" are opposed.

Attitude of United States in Controversy with Mexico.

In 1880 the United States protested to Mexico against the diversion of water of the Rio Grande for irrigation (1 *Moore, Digest of International Law*, p. 653). In 1895

Mexico protested to the United States against a similar use made by the United States, but the United States replied that "the rules of international law imposed upon the United States no duty to deny to its inhabitants the use of the water of that part of the Rio Grande lying wholly within the United States although such use resulted in reducing the volume of water in the river below the point where it ceased to be entirely within the United States" (1 *Moore, Digest of International Law*, p. 654). Again, in 1896, Mexico protested to the United States about the use of water in the United States for irrigation. This later led to the decision in *United States* v. *Rio Grande Co.*, 174 U.S. 690. On May 21, 1906, a convention was concluded between the United States and Mexico providing for the equitable distribution of the water of the Rio Grande for irrigation purposes (1 U.S. TREATIES AND CONVENTIONS, p. 1204). By this convention the United States agreed to deliver to Mexico a certain volume of water annually, but article 5 of the convention distinctly states that the United States does not concede any legal basis for claims asserted or to be asserted by owners of land in Mexico, "nor does the United States in any way concede the establishment of any general principle or precedent by the concluding of this treaty." In 1913 negotiations were conducted looking toward an agreement between the United States and Mexico concerning a division of the waters of the Colorado river, but were abandoned on account of political conditions (*U.S. Foreign Relations*, 1913, p. 977 *et seq.*).

Various States have made treaties concerning the common use of waters. An interesting example of such a treaty is that between Norway and Sweden of August 26, 1905 (*Descamps et Renault, Recueil International*, p. 367). A somewhat similar treaty was made between Norway and Finland, February 14, 1925 (49 LEAGUE OF NATIONS TREATY SERIES, 381). An important treaty concerning the

use of waters of the Meuse was concluded by Belgium and Holland, May 12, 1863.

By an exchange of notes of June 12 and June 15, 1925, the British and Italian Governments effected an agreement concerning the utilization of the water of the river Gash in Eritrea and in the province of Kassala (121 BRITISH AND FOREIGN STATE PAPERS, p. 798). These waters are to be used for irrigation purposes, and the discharge of the river up to certain amounts is made available to each of the two Governments for such purposes.

Interstate Compacts.

Recent developments in the United States with reference to interstate compacts have also tended toward establishing bases for an equitable division and apportionment of international and interstate waters. The outstanding example is the Colorado River Compact, signed at Santa Fé, New Mexico, November 24, 1922. The compact was authorized by Act of Congress approved August 19, 1921, 42 STAT. AT L., pp. 171-172, the purpose of which the preamble stated, in part, as follows (at p. 172):

> "Whereas the territory included within the drainage area of the said stream and its tributaries is largely arid and in small part irrigated, and the present and future development necessities and general welfare of each of said States and of the United States require the further use of the waters of said streams for irrigation and other beneficial purposes, and that future litigation and conflict respecting the use and distribution of said waters should be avoided and settled by compact between said States;"

The compact was in the enacting clause said to provide "for an equitable division and apportionment among said States of the water supply of the Colorado River and of

the streams tributary thereto." By the Act of December 21, 1928, c. 42, esp. §8, 45 STAT. AT L., 1062, the "equitable division of the benefits, including power, arising from the use of water accruing to said States" is to be made according to the terms of the Compact and of other contemplated interstate compacts, in such a way as to bind not only the participating States, but the United States.

Article 4 of the Compact itself provides that, inasmuch as the Colorado River has ceased to be navigable, "the use of its waters for purposes of navigation shall be subservient to the use of such waters for domestic, agricultural and power purposes." It is also provided that the waters may be impounded and used for the generation of electrical power, but "such impounding and use shall be subservient to the use and consumption of such water for agricultural and domestic purposes and shall not interfere with or prevent use for such dominant purposes." The term "domestic use" is defined in article 2 of the Compact to include "the use of waters for household, stock, municipal, mining, milling, industrial, and other like purposes, but shall exclude the generation of electrical power." Here again the priority and dominance of domestic use of water is recognized.

APPENDIX "B."

BRIEF STATISTICAL SUMMARY OF THE CASE.

The Swift river and the Ware river, both of which are wholly in Massachusetts, are non-navigable tributaries of the Chicopee river, a non-navigable tributary of the Connecticut river (Reprint of Answer, pp. 81, 96).

Total watershed of Connecticut river (Bill, p. 4),	11,300 sq. miles
Watershed of Connecticut river lying above Massachusetts-Connecticut boundary (Reprint of Answer, p. 97),	9,915 sq. miles
Drainage area of Connecticut river watershed in Connecticut (by subtracting 9,915 from 11,300),	1,385 sq. miles
Total drainage area of Ware river (Bill, p. 5),	221 sq. miles
Drainage area of Ware river at point of partial diversion (Reprint of Answer, p. 11),	98 sq. miles
Total drainage area of Swift river (Bill, p. 5),	213 sq. miles
Drainage area of Swift river at point of partial diversion (Reprint of Answer, p. 21; Plan opposite Reprint, p. 36; Reprint of Answer, p. 85),	186 sq. miles
Drainage area of Swift river at Bondsville (Reprint of Answer, p. 93),	195 sq. miles
Population of Metropolitan Area about Boston (Reprint of Answer, pp. 20-21),	1,900,000
Population of Connecticut in 1920 (U.S. Bureau of the Census, 14th census, 1920, vol. 1, p. 20),	1,380,631

Population of Connecticut in 1928 (U.S. Bureau of Foreign and Domestic Commerce. Statistical abstract of the United States, 1929, p. 7; annual midyear estimates by States). 1,667,000

DIVERSIONS PROPOSED.

Ware River.

Massachusetts Legislation.

Flood flow in excess of 85,000,000 gallons per day between November 30 and June 1 of each year. No water to be diverted between May 31 and December 1 in any year without approval of State Department of Health (Mass. St. 1926, c. 375, §§ 1, 4; Reprint of Answer, pp. 37, 40; 84-85).

War Department Decision.

Diversion of flood waters in excess of 85,000,000 gallons per day for the period from October 15 to June 15 of each year (Reprint of Answer, pp. 81-87, esp. pp. 86-87).

Swift River.

Massachusetts Legislation.

Diversion authorized of all waters except those required to maintain a flow at Bondsville (about five miles below proposed Swift river reservoir; Reprint of Answer, p. 93) of 20,000,000 gallons per day. The Massachusetts legislation requires a guaranteed flow of 20,000,000 gallons at Bondsville (Mass. St. 1927, c. 321, §1; Reprint of Answer, p. 52).

War Department Decision.

Diversion of all waters except those required to maintain a flow at Bondsville of 20,000,000 gallons per day

except that during the period from June 1 to November 30 (both inclusive) 110 cubic feet per second shall be released from the impounded waters, when the flow of the Connecticut river at Sunderland, Massachusetts (a town about 20 miles north of the confluence of the Chicopee and Connecticut rivers), is 4650 cubic feet per second or less; and, when said flow of the Connecticut river is more than 4650 and less than 4900 cubic feet per second, 70 cubic feet per second shall be released.

The Secretary of War finds that no impairment of the navigable capacity of the Connecticut river will result from these diversions and furthermore that a discharge of 4900 cubic feet per second at Sunderland corresponds to an average lower low tide gauge height of 2.1 and a discharge of 4650 cubic feet per second at Sunderland to an average lower low tide gauge height of 2.0 at Hartford.

Mean annual discharge of Connecticut river at Massachusetts-Connecticut boundary about 17,000 cubic feet per second.

Mean annual discharge of Swift river at proposed reservoir about 300 cubic feet per second (Reprint of Answer, p. 97).

FILE COPY

In the

Supreme Court of the United States.

OCTOBER TERM, 1929.

No. 13, ORIGINAL.

THE STATE OF CONNECTICUT

v.

THE COMMONWEALTH OF MASSACHUSETTS.

PAMPHLET CONTAINING CHARTS OF STREAM FLOW ON CONNECTICUT AND SWIFT RIVERS FOR USE AS CHALKS.

JOSEPH E. WARNER,
Attorney General of Massachusetts.
BENTLEY W. WARREN,
Special Assistant Attorney General.
GERALD J. CALLAHAN,
Assistant Attorney General,
R. AMMI CUTTER,
Assistant Attorney General.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

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PAMPHLET CONTAINING CHARTS OF STREAM FLOW ON CONNECTICUT AND SWIFT RIVERS FOR USE AS CHALKS.

The attached charts of stream flow in 1923 and in 1928 are presented as chalks to illustrate the allegations of the bill and of the answer and the arguments in the Massachusetts brief. They are offered as diagrams fairly representative of extreme wet and dry flow conditions on the *Connecticut* river at the point where it leaves Massachusetts and enters the State of Connecticut. The charts are not now offered as evidence, although, if there are later hearings before the Special Master, these and similar graphs of stream flow for as many years in the past as possible will doubtless be presented in evidence and duly authenticated. For the moment, however, these charts are intended only to supplement the explanations of the Massachusetts project and of the War Department findings made by counsel in argument and brief.

Each chart presents two graphs representing the quantity of water flowing in the *Connecticut* river at the Massachusetts–Connecticut state line throughout an entire calendar year. One chart shows the flows that were recorded in the wet year 1928, and the other in the dry year 1923. These years were selected to represent wet and dry conditions respectively during the summer and fall months only, when the question of wetness and dryness is most important. The average rate of flow during each calendar week throughout the year is represented by the height of the column for that week, that is, the height of the area shaded by cross-hatching, including also any area shaded in solid black.

On each graph is shown the effect that the authorized diversions would have had upon the flow of the *Connecticut* river had they been operative in those years. The graph at the left on each chart shows the effect of the diversions authorized by Massachusetts legislation without regard to the modifications and requirements of the War Department; the graph at the right shows the effect of these diversions authorized by Massachusetts legislation as they have been modified by the limitations and requirements of the War Department.

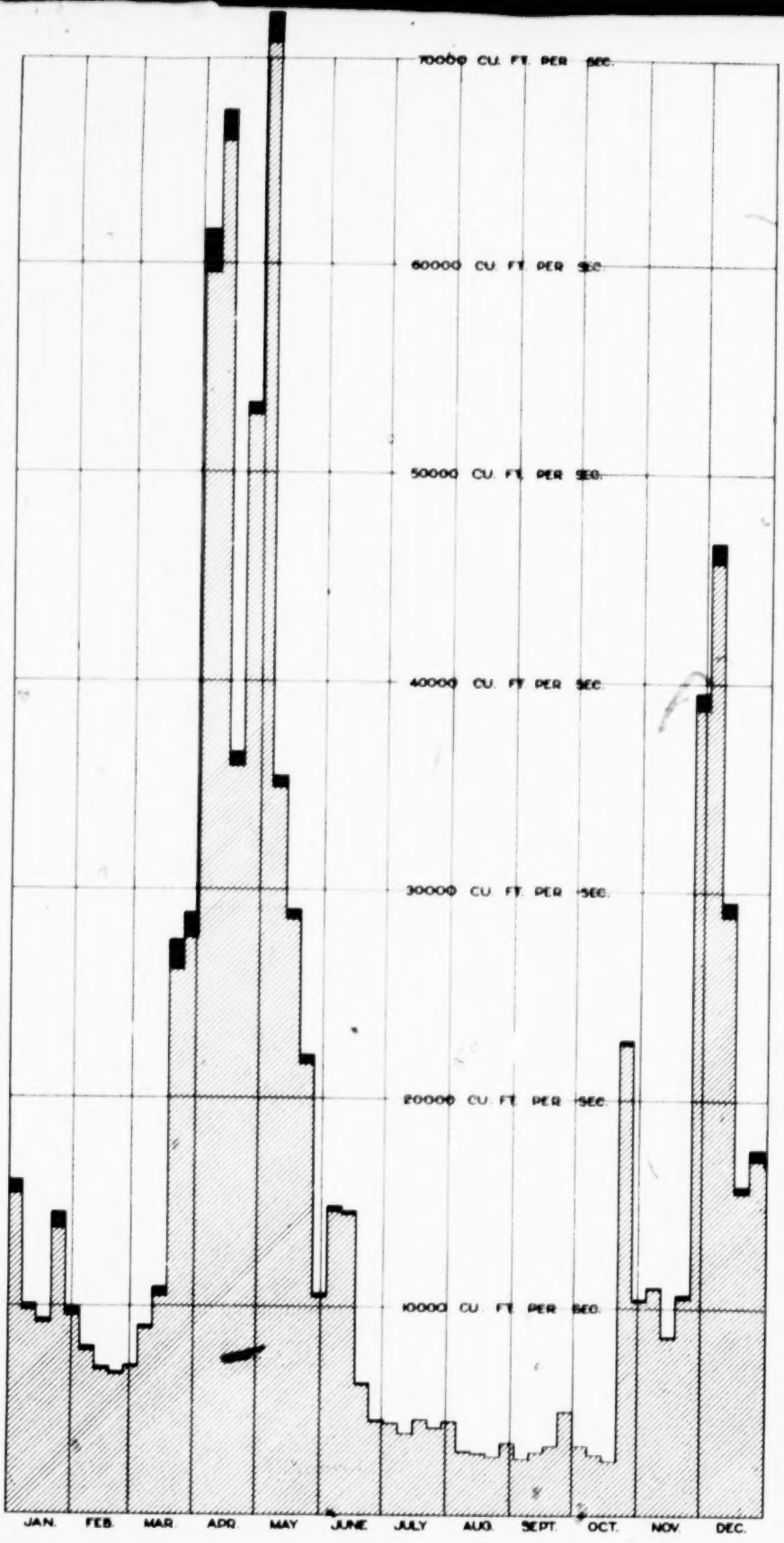
At the top of each weekly column the area shaded in solid black indicates the amount by which the flow in the *Connecticut* river would have been decreased by the authorized diversions from both *Ware* and *Swift* rivers, had the Massachusetts project then been in operation. It will be noted that the amount of this diversion decreases generally with the decrease of the total amount flowing in the river, and that at times of low flow it is negligible, being in fact represented by the thickness of the very thin black line across the top of each weekly column. In each of those weeks in which the net result of the diversions authorized by the Massachusetts legislation as modified by the re-

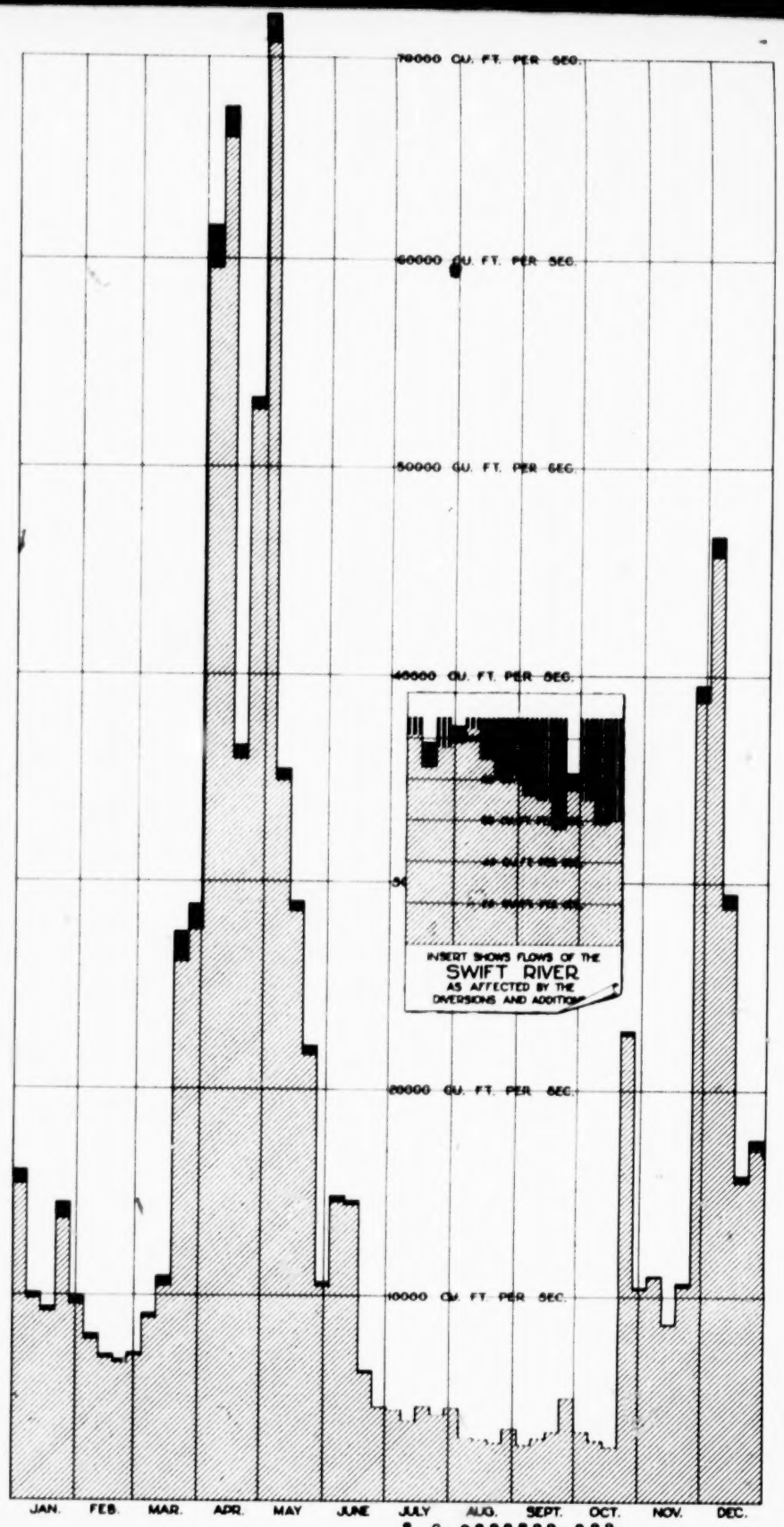
quirements of the War Department would have resulted in an increase instead of a decrease in the flow of the river, a broken or dotted line has been drawn across the top of the column, instead of a full line, and the thickness of this broken or dotted line represents the amount by which the flow would have been increased.

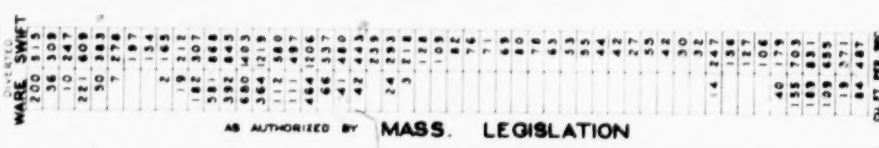
What the War Department officials consider a low flow or a dry season flow in the *Connecticut* river at the Massachusetts–Connecticut state line is indicated by the terms of the decision of the Department waiving objection to the diversion of *Swift* river flows. They have set a limit of 4900 cubic feet per second at the Sunderland Gauging Station of the United States Geological Survey where the drainage area is 8000 square miles, equivalent to about 5950 cubic feet per second at the Massachusetts–Connecticut state line where the drainage area is 9722 square miles, corresponding to the flows shown on these charts. For all flows above this limit the War Department is satisfied to allow the entire diversion of the *Swift* river flows as authorized by the Massachusetts legislation. When the flow in the *Connecticut* river at Sunderland falls below this point, Massachusetts must augment the flow in the *Swift* river.

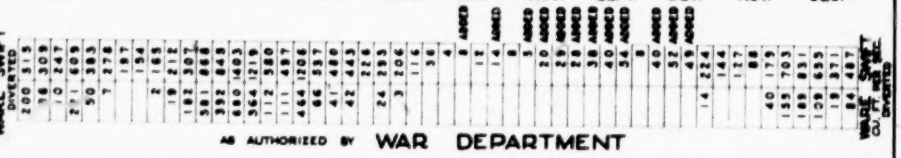
Because the effect of the proposed diversions on the flow of the *Connecticut* river is so insignificant, particularly during dry seasons, an insert has been added to the 1923 graph in order to make it visible on the chart. This insert shows the effect of the project on the flow of the *Swift* river at the proposed point of diversion, for a period corresponding to the period during which the flow of the *Connecticut* river is indicated immediately below. The drainage area of the *Swift* river is less than two per cent of that of the *Connecticut* river. In order to show distinctly the effect upon the flow of the *Swift* river of the diversions as modified by the requirements of the War Department, it has been necessary

to use a considerably larger scale on which to plot these flows. The flow of the *Swift* river and the quantities diverted or added are represented in cubic feet per second in a manner similar to that used in the larger graphs of the *Connecticut* river, the area shaded in solid black showing the amount by which the flow of the *Swift* river would have been decreased (had the Massachusetts project as modified by the War Department findings been in operation) and the area with broken shading or vertical bands showing the amount by which the flow of the *Swift* river would have been increased because of the requirements of the War Department.







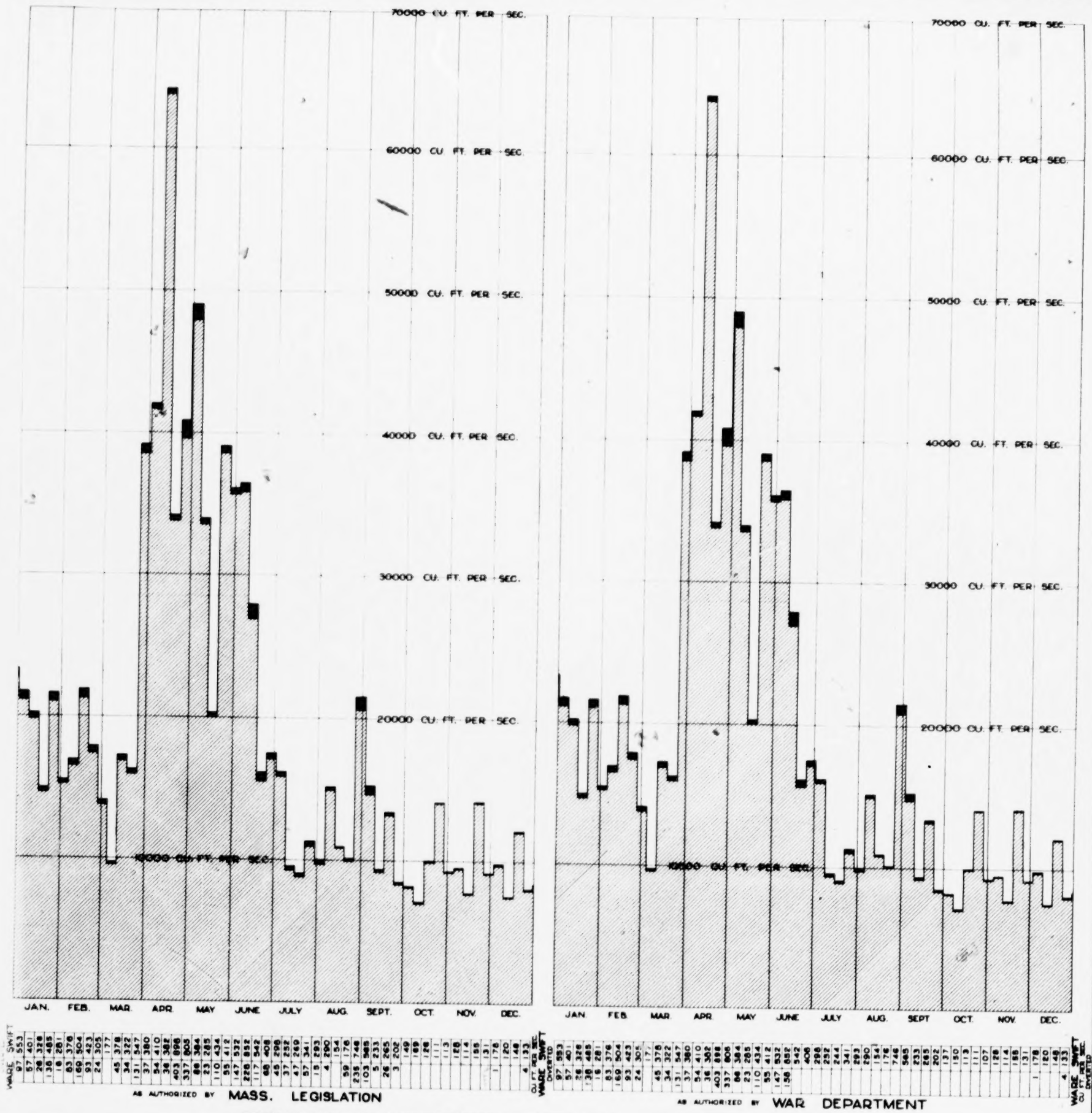


COMMONWEALTH OF MASSACHUSETTS ~ METR. DISTR. WATER SUPPLY COMMISSION

RELATION OF AUTHORIZED DIVERSIONS TO THE FLOW OF THE CONNECTICUT RIVER IN THE DRY YEAR 1923

WEEKLY AVERAGE FLOWS AT THE MASS.- CONN. STATE LINE

DIVERSIONS SHOWN THUS: ▥ ADDITIONS TO FLOW SHOWN THUS: ▨



WARE SWIFT — CU. FT. PER SEC. DIVERTED

JAN.	FEB.	MAR.	APR.	MAY	JUNE	JULY	AUG.	SEPT.	OCT.	NOV.	DEC.
97 553	57 401	26 328	36 485	16 281	83 376	169 904	93 423	24 305	177		
45 378	34 322	131 547	37 380	54 410	36 382	403 896	337 805	88 384	23 285	55 412	147 532
226 852	117 542	68 408	45 296	37 252	47 269	57 341	18 293	4 290	154	59 176	235 746
103 965	5 233	26 265	3 202	149	189	128	111	113	120	114	185
131	176	1	120	148	4 133						

AS AUTHORIZED BY MASS. LEGISLATION

WARE SWIFT — CU. FT. PER SEC. DIVERTED

JAN.	FEB.	MAR.	APR.	MAY	JUNE	JULY	AUG.	SEPT.	OCT.	NOV.	DEC.
97 593	57 401	26 328	36 485	16 281	83 376	169 904	93 423	24 305	17		
45 378	34 322	131 547	37 380	54 410	36 382	403 896	337 805	88 384	23 285	110 434	147 532
150 852	542	406	296	232	244	341	293	290	154	176	746
585	233	285	202	137	130	113	111	107	128	114	185
131	178	1	120	148	4 133						

AS AUTHORIZED BY WAR DEPARTMENT

COMMONWEALTH OF MASSACHUSETTS ~ METR. DISTR. WATER SUPPLY COMMISSION

RELATION OF AUTHORIZED DIVERSIONS TO THE FLOW OF THE CONNECTICUT RIVER IN THE WET YEAR 1928

WEEKLY AVERAGE FLOWS AT THE MASS. - CONN. STATE LINE

DIVERSIONS SHOWN THUS: [▭] ADDITIONS TO FLOW SHOWN THUS: [▭] (NONE IN THIS WET YEAR)

FILE COPY

SEP 29 80

In the

Supreme Court of the United States.

OCTOBER TERM, 1930.

No. 12. ORIGINAL.

THE STATE OF CONNECTICUT

v.

THE COMMONWEALTH OF MASSACHUSETTS.

DEFENDANT'S DISCLAIMER OF INTENTION TO FILE EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER.

JOSEPH E. WARNER,
Attorney General of Massachusetts.
BENTLEY W. WARREN,
Special Assistant Attorney General of Massachusetts.
GERALD J. CALLAHAN.
R. AMMI CUTTER.

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THE COMMONWEALTH OF MASSACHUSETTS.

DEFENDANT'S DISCLAIMER OF INTENTION TO FILE EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER.

And now comes the defendant, The Commonwealth of Massachusetts, and says that it does not desire to file any exception or objection to the report of the Special Master, the Honorable Charles W. Bunn, which report has heretofore been filed by leave of this Honorable Court.

THE COMMONWEALTH OF MASSACHUSETTS.

By JOSEPH E. WARNER,
Attorney General,
By BENTLEY W. WARREN,
Special Assistant Attorney General,
GERALD J. CALLAHAN,
R. AMMI CUTTER.